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Suffer the Little Children—But Not in My Neighborhood: A Constitutional View of Age-Restrictive Housing

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I. INTRODUCTION

As a result of decisions by the United States Supreme Court,[1] and the passage of state[2] and federal[3] civil rights statutes, legal barriers to racially integrated housing have become practically nonexistent.[4] The focus of the courts and the legislatures has shifted to the problem of "exclusionary" zoning, whereby the zoning power is used by local governments in various ways to prevent the influx of lower income groups into a particular area.[5] New Jersey, New York, and Pennsylvania courts have attempted to deal with the legal aspects of the problem, and have, with some success, undercut the effectiveness of exclusionary devices.[6] In addition, much has been written on the social consequences of exclusionary zoning.[7]

Less evident, but becoming increasingly conspicuous, are mechanisms by which ownership and occupancy of land is restricted to a particular age group. Such discrimination often is designed to exclude children from particular housing opportunities. While litigation involving this situation was unheard of a decade ago,[8] cases are arising with increasing frequency. In addition, public recognition of the problems created by age-restrictive housing is becoming increasingly evident.[9]

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1. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948).

2. At least 40 states and the District of Columbia have passed Fair Housing Laws or have provisions in state civil rights statutes barring discrimination on the basis of race in the sale or rental of housing. *See, e.g.*, N.Y. EXEC. LAW, § 296.2-a, 3-b (McKinney Supp. 1978).

3. *See, e.g.*, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601, 3619, 3631 (1976).

4. This is not to say, of course, that social segregation in housing has become an insignificant problem. Rather, the author only means to point out that there is no longer any *legal* basis upon which housing can be maintained in a racially segregated manner.

5. *See*, Rubinowitz, *Exclusionary Zoning: A Wrong in Search of a Remedy*, 6 J.L. REF. 625 (1973).

6. *See, e.g.*, Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975); Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975); Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970).

7. *See, e.g.*, Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 780-793 (1969).

8. The author's research disclosed no cases dealing with age restrictions decided by appellate courts prior to 1971.

9. Recently, the popular television magazine, "60 Minutes," presented a feature story on the difficulty encounted by families with children in locating rental housing in the southern California area. "60 Minutes," July 30, 1978, copyright CBS-TV. *See* notes 12-13 *infra*.

I intend in this article to examine the federal constitutional aspects of age-restrictive devices designed to exclude children. While it will become apparent in the course of the analysis that certain empirical data are necessary to the legal result, I have made no effort to acquire that data for purposes of this article since the present goal is to create an appropriate framework for analysis of constitutional questions. The focus of the article will be on the due process and equal protection clauses of the fourteenth amendment and will necessitate a close analysis of the relevant cases. It is hoped that this article will clarify the constitutional issues arising in this context and provide a basis for their resolution, especially since no other works seem to deal comprehensively with the subject.[10]

This article will first briefly outline the present impact of the problem of age-restrictive housing and the forms through which age discrimination has occurred and is most likely to occur in the future. It will then closely examine each of these exclusionary devices, including an analysis of the reported cases and the likelihood of success of future federal constitutional challenge, the mechanism used to accomplish the exclusion, and the state interest asserted. Finally, it will demonstrate the difficulties in applying federal constitutional law to some methods of age restriction, particularly the difficulties presented by the necessity for finding the requisite state action.

II. THE PROBLEM

The existence of age-restrictive housing in the United States appears widespread. Retirement communities employing a number of exclusionary devices abound,[11] and "swinging singles" apartments and condominiums barring children and even childless marrieds can be found advertised in many metropolitan newspapers.[12] It has been asserted that the shortage of rental housing available to families with children has reached the critical stage in some cities.[13]

This increasing exclusivity occurs at a time when there exists a general shortage of adequate housing, especially in the rental market. Vacancy

10. An excellent article dealing exclusively with the constitutional aspects of retirement communities may be found at Doyle, *Retirement Communities: The Nature and Enforceability of Residential Segregation by Age*, 76 MICH. L. REV. 64 (1977). *See also* Note, *Housing Discrimination Against Children: The Legal Status of a Growing Social Problem*, 16 J. FAM. L. 559, 588-92 (1978).

11. *See* Doyle, *supra* note 10, at 64-65, and authorities cited therein.

12. *See, e.g.*, Columbus Dispatch, July 4, 1978, at D-9, col. 4. *See also Adults Only*, TIME, July 3, 1978, at 67.

13. TIME, *supra* note 12, at 67. In New Orleans only one of every four apartments is available to families with children, while in Los Angeles the figure is 60%. *Id.* The author's survey of the classified sections of two recent newspapers in Columbus, Ohio, reveals that between 30 and 40 percent of the rental housing is available to adults only. Columbus Dispatch, July 4, 1978, at D-9, col. 1; Columbus Citizen-Journal, July 4, 1978, at 20, col. 2. These figures represent a percentage of advertisements for furnished and unfurnished rental housing stipulating "adults only," "no children," or similar language, to total rental advertisements. They do not, of course, include landlords who do not indicate the age-exclusive nature of the housing in the ad, but nevertheless refuse to rent to families with children. *Cf.* "60 Minutes," *supra* note 9.

rates in Manhattan are presently only 1 1/2-2%[14] and many other major cities have similar vacancy rates.[15] As a result of these two trends, many couples with children, primarily in the lower and middle income brackets, are finding it virtually impossible to find suitable housing.[16]

Presently only six states have statutes prohibiting discrimination in rental housing because children are present among the prospective tenants.[17] A number of others have general provisions in their civil rights statutes barring discrimination in housing on the basis of age,[18] but it is problematic whether these provisions preclude discrimination based upon the presence of children.[19]

It is not surprising, therefore, that the 1970s is the only decade that has seen significant litigation challenging the validity of devices designed to promote age-homogeneous living. It is only more recently that the plaintiffs in such cases have been the persons excluded from the desired housing, rather than taxpayer-neighbors of the restricted housing.[20] Much of the litigation has focused on the provision of age-exclusive housing for the elderly, or more accurately, those of retirement age.[21] Recently, however, an increasing amount of litigation has centered upon housing which

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14. *The Tight U.S. Apartment Squeeze*, TIME, May 1, 1978, at 43.

15. *The Great Apartment Squeeze of the '70s*, U.S. NEWS AND WORLD REP., May 8, 1978, at 93-95.

16. It is no answer to the problem to say that families with children have no cause for complaint since, as a result of a very low general vacancy rate, their obtaining housing that is presently closed to them would merely result in someone else being excluded from the desired housing. First, the situation is not that there are *no* vacancies; therefore it is likely that some housing is vacant at any point in time that may be desirable to families with children. More importantly, a denial of the right to compete with others for available housing is itself an important denial. It certainly would not be acceptable to deny a Black the right to compete for a limited number of law school places by saying that, if accepted, he would merely displace someone else.

17. ARIZ. REV. STAT. § 33-1317 (Supp. 1978-79); DEL. CODE tit. 25 § 6503 (1975); ILL. ANN. STAT. ch. 80, §§ 37-38 (Smith-Hurd 1966 & Supp. 1979); MASS. ANN. LAWS. ch. 151B, § 4.11 (Michie/Law. Co-op 1976); N.J. STAT. ANN. § 2A: 170-92 (West 1971); N.Y. REAL PROP. LAW §§ 236-37 (McKinney 1968). The Attorney General of Michigan has issued an opinion interpreting the age discrimination provisions of Michigan's Fair Housing Law to prohibit a landlord from refusing to rent to a prospective tenant because of the presence of children. *See* [1975-1976] MICH. ATT'Y GEN. BIENNIAL REP. 413 (1976).

18. CONN. GEN. STAT. ANN. § 53-35 (West Supp. 1979) (does not apply, however, to privately owned housing developed and maintained exclusively for persons within a specified age group); MONT. REV. CODES ANN. § 64-306 (Supp. 1977) (does permit discrimination on the basis of level of maturity or ability to handle responsibility); N.H. REV. STAT. ANN. § 354-A.8.v. (1966 & Supp. 1977). *See also* CAL. CIV. CODE § 51 (West Supp. 1979) as interpreted in Marine Point, Ltd. v. Wolfson, 47 U.S.L.W. 2437 (Cal. Super. App. Div. 1978) (statute broadly interpreted to proscribe arbitrary discrimination based on age although statute does not specifically mention age).

19. Since the child is not acutally the lessee of the apartment in most cases, a restrictive interpretation of an age discrimination provision may not prohibit a refusal to rent because of the presence of children in a family, since the refusal occurs not as a result of the age of the lessee, but because the lessee has chosen to have children. *But see* [1975-1976] MICH. ATT'Y GEN. BIENNIAL REP. 413 (1976).

20. *See* cases cited at notes 231, 232 *infra*.

21. Generally, such restrictions establish a minimum age of either fifty-two or fifty-five, which can hardly be described as "elderly." *See, e.g.*, Taxpayers Ass'n of Weymouth Twp., Inc. v. Weymouth Twp., 71 N.J. 249, 364 A.2d 1016 (1976) (minimum age of fifty-two years); Campbell v. Barraud, 58 App. Div. 2d 570, 394 N.Y.S.2d 909 (1977) (minimum age of fifty-five years).

"merely" attempts to exclude children, while permitting adults of any age to reside therein.[22]

While early challenges to age-exclusionary housing are generally successful,[23] the recent trend has been to uphold attempts to limit occupancy to persons of certain defined ages. In fact, in only one case decided after 1971 has a restriction been struck down as unconstitutional.[24] The fact that recent challenges to age-restrictive housing have not generally been successful, however, is not particularly illuminating, since the absolute number of cases is small in spite of the recent increase. In addition, the cases involve fact patterns that differ greatly from each other, and opinions that often fail to reach or discuss the constitutional issues. Finally, many of the cases were decided before the recent U.S. Supreme Court decision in *Moore v. City of East Cleveland*[25] which may have important implications for age-restrictive housing, although perhaps not as crucial in this context as some have predicted.[26] Nevertheless, a close scrutiny of the cases within an appropriate framework for constitutional analysis will yield useful predictors in future constitutional litigation.

III. Zoning Restrictions

Age restrictions generally take one of four forms. Often the restriction is accomplished by direct governmental action through a zoning, or similar,[27] ordinance. This ordinance can be either "inclusionary" or "exclusionary";[28] both types have been upheld by the courts. The second device is the use of restrictive covenants that run with the land prohibiting occupancy by certain age-restricted groups. While this device has appeared in only one or two cases,[29] there is reason to believe that it may be the least susceptible to constitutional challenge, at least if the age restrictions are confined to a limited geographical area.[30] Rules or

22. *See, e.g.*, Ritchey v. Villa Neuva Condominium Ass'n, 81 Cal. App. 3d 688, 146 Cal. Rptr. 695 (1978).

23. *See, e.g.*, Taxpayers Ass'n of Weymouth Twp., Inc. v. Weymouth Twp., 125 N.J. Super. 376, 311 A.2d 187 (1973), *rev'd*, 71 N.J. 249, 364 A.2d 1016 (1976); Shepard v. Woodland Twp. Comm. & Planning Bd., 128 N.J. Super. 379, 320 A.2d 191 (1974), *aff'd on other grounds*, 135 N.J. Super. 97, 342 A.2d 853 (1975), *rev'd*, 71 N.J. 230, 364 A.2d 1005 (1976); Molino v. Mayor of Glassboro, 116 N.J. Super. 195, 281 A.2d 401 (1971).

24. Franklin v. White Egret Condominium, Inc., 358 So. 2d 1084 (Fla. App. 1977).

25. 431 U.S. 494 (1977).

26. *See* Doyle, *supra* note 10, at 92-97.

27. *See*, Taxpayers Ass'n of Weymouth Twp., Inc. v. Weymouth Twp., 71 N.J. 249, 259, 364 A.2d 1016, 1021 (1976). In this case, the relevant ordinance took the form of a regulatory ordinance concerning the location and licensing of mobile home parks. Because of the nature of the specific provisions of the ordinance, the court stated that it functioned as a zoning ordinace.

28. An "inclusionary" ordinance is one in which the zoning classification permits other uses, as well as age-restrictive housing, within the zoning district. An " exclusionary" ordinance permits only age-exclusive housing in the zoning district. For a discussion of the possible implications of this dichotomy, and a criticism of its usefulness, *see* Note, *Housing for the Elderly: Constitutional Limitations and Our Obligations*, 5 Fla. St. U.L. Rev. 423, 431-32 (1977).

29. *See* text accompanying notes 185-97 *infra*. *See also* Coquina Club, Inc. v. Mantz, 342 So. 2d 112, 113-14 (Fla. App. 1977).

30. *See* Doyle, *supra* note 10, at 104-07.

conditions established by a landlord or condominium association as part of the contractual obligations of the owner or lessee are a third method used to exclude families with children. Finally, a landlord or condominium owner can merely refuse to initially rent or sell to a family which includes children.[31]

The zoning cases will be used as the vehicle for developing the framework for substantive constitutional analysis. This is a desirable approach for a number of reasons. First, the use of the zoning power presents a clear case of governmental, as opposed to private, action. Second, at least fifty percent of the decided cases challenging age-restrictive housing concern zoning or similar municipal action. Most important, almost all the reasoned discussion of constitutional issues occurs within the context of these cases. The only drawback in using the zoning cases as a primary focus is that they have, almost without exception, involved attempts to establish "retirement communities," prohibiting occupancy by both children and many adults. Despite this, the issues presented are similar to those presented by other exclusionary devices, except for the important question of state action, and can therefore suitably serve to accomplish the purpose stated above.

A. *Pre-*Moore *Zoning Cases*

The original concept of zoning was to sort out incompatible uses.[32] The idea was to separate industrial and heavily commercial areas from residential districts, thereby protecting residential occupants from the pollution, traffic, and other annoyances associated with those uses.[33] Recently, however, the concept of the "public health, safety, and welfare," necessary to support the use of the zoning power, has expanded. An increasing number of courts are recognizing the legitimacy of zoning solely for aesthetic purposes,[34] and even those that do not are quick to find other, more traditional purposes to widen the scope of the zoning power.[35] Thus, minimum lot sizes, architectural requirements, minimum frontages, and other requirements have been sustained by the courts.[36] It is in this context that age-restrictive housing must be considered; a context in which the courts seem to have recognized that a municipality can legitimately consider the needs, desires, and values of only a portion of the community

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31. *See* text accompanying notes 257-73 *infra*.

32. J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 453 (2d ed. 1975); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

33. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 391 (1926). *See also* Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

34. *See* Westfield Motor Sales Co. v. Town of Westfield, 129 N.J. Super. 528, 324 A.2d 113 (1974); Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967).

35. *See, e.g.*, United Advertising Corp. v. Metuchen, 42 N.J. 1, 198 A.2d 447 (1964); *See also* Annot., 21 A.L.R.3d 1222, 1226 (1968).

36. Senior v. Zoning Comm'n of New Canaan, 146 Conn. 531, 153 A.2d 415 (1959) (minimum lot size); Clemons v. City of Los Angeles, 36 Cal. 2d 95, 222 P.2d 439 (1950) (minimum width); State *ex rel.* Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970) (architectural standards relating to style).

and set aside a segment of its territory for the exclusive accommodation of that group.[37]

The first case involving an attempt at age-restrictive housing was *Molino v. Mayor of Glassboro*.[38] The borough of Glassboro, New Jersey, established strict limitations on the building of garden apartments, which severely limited the number of multi-bedroom units that could be constructed,[39] and required, among other things, that those apartment complexes include either tennis courts or swimming pools. The borough candidly acknowledged that the primary purpose of the ordinance was "to keep children out of Glassboro."[40] The court found that such apartments would not be within the price range of either middle or lower income families, and that there was no market in Glassboro for high-priced rental housing.

While the court found the ordinance inconsistent with the state enabling legislation[41] and therefore beyond the zoning power of the municipality, it also alluded to constitutional problems with the ordinance:[42] "There is also a right to live as a family, and not be subject to a limitation on the number of members of that family in order to reside any place. Such legal barriers would offend the equal protection mandates of the Constitution."[43]

A number of aspects of this case should be kept in mind. First, the ordinance was applicable throughout the entire borough of Glassboro. Second, the sole interest asserted by the borough for the exclusion of children was fiscal. Finally, the court determined that there was a distinct need for middle and lower income housing within the borough, and no need for apartment housing for the affluent. Thus, the borough authorities were acting contrary to the housing needs of their own residents, as well as, perhaps, contrary to the needs of those who might wish to move to

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37. *See* text accompanying notes 84-89 *infra*. Certainly not everyone in a community needs or desires a single-family home on a large lot, but those people may still desire to live in the particular area where these requirements are in force. Thus, while the municipality may have provided for their needs and desires in another segment of the community, with respect to the portion in which such requirements are applicable, the values of those desiring large-lot housing or, for example, tudor architecture, are those which prevail.

38. 116 N.J. Super. 195, 281 A.2d 401 (1971).

39. In any given apartment complex, at least 70% of the units could have no more than one bedroom, no more than 25% of the units could have more than two bedrooms, and no more than five percent of the units could have more than three bedrooms. *Id.* at 201, 281 A.2d at 403.

40. *Id.* at 201, 281 A.2d at 404.

41. The court found that the purpose of the ordinance was not consistent with the general welfare standard of the state enabling legislation. *Id.* at 204, 281 A.2d at 406. Depending upon a state's interpretation of its own laws, this standard may or may not be the same as the general welfare standard for regulatory legislation under the fourteenth amendment to the U.S. Constitution. *See* text accompanying notes 145-81 *infra*.

42. The question whether a particular ordinance is beyond the zoning power of the municipality may itself have constitutional implications. *See* text accompanying notes 58-61 *infra*. *See also* Note, *supra* note 28, at 437.

43. 116 N.J. Super. at 204, 281 A.2d at 405-06.

Glassboro.[44] As will be shown, all these facts have constitutional significance.

In contrast to *Molino*, the first case of age-exclusive housing to reach the New York appellate courts[45] resulted in the validation of a zoning ordinance that permitted, among other uses,[46] "multiple residences designed to provide living and dining accommodations, including social, health care, or other supporting services and facilities for aged persons . . . ."[47] In *Maldini v. Ambro*, the stated purpose of the ordinance under attack was meeting the town's demonstrated need for adequate housing for the aged in the community.[48] The court upheld the ordinance against the claim of local taxpayers that the presence of retirement communities would result in the depreciation of their property values. The court relied heavily on three factors: (1) the demonstrated need in the community for housing for the aged; (2) the "inclusionary" nature of the ordinance; and (3) the lack of discriminatory intent or effect of the ordinance with respect to younger people in the community. In connection with the latter two factors, neither the district in which such communities were permitted nor the retirement community itself prohibited the occupancy of younger persons. While the retirement housing was specially designed to meet the physical needs of older persons, occupancy was not limited to them.[49] Also, there was no indication that the presence of such housing would impose a hardship on any other segment of the population in obtaining housing in the community.

While constitutional objections to the ordinance were apparently not considered in *Maldini*,[50] it obviously stands in marked relief to *Molino*. In *Molino*, the motive behind the ordinance was fiscal rather than social; it was intended to and had the effect of discriminating against younger persons; it served to exacerbate rather than ameliorate housing problems

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44. *See* Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975) (holding that the relevant area for determining whether an ordinance is exclusionary is whether it meets its fair share of the *regional* housing needs, not only those of the particular zoning authority).

45. Maldini v. Ambro, 36 N.Y.2d 481, 330 N.E.2d 403, 369 N.Y.S.2d 385 (1975).

46. The zoning classification also permitted single-family dwellings on minimum two acre plots, farms, churches, schools, and libraries. *Id.* at 483, 330 N.E.2d at 405, 369 N.Y.S.2d at 388.

47. *Id.*

48. *Id.* at 485, 330 N.E.2d at 405, 369 N.Y.S.2d at 389.

49. There was no minimum age requirement for residence in such communities. It was clear, however, that they were to be specially designed for "aged" persons. Further, such communities were the most profitable use of the land within the district and thus had the effect of limiting usage within the district to retirement communities. *Id.* at 489, 330 N.E.2d at 409, 369 N.Y.S.2d at 393 n.1 (Jasen, J., dissenting).

50. While the court does discuss the breadth of the zoning power under the Constitution and the presumption favoring the constitutionality of zoning ordinances, it purports to decide the case on the basis of whether the state enabling legislation requiring that land use regualtions must promote the general welfare has provided a sufficient basis for the ordinance. *Id.* at 483, 330 N.E.2d at 405, 369 N.Y.S.2d at 388. It is possible, and perhaps likely, that the state enabling legislation delegated to the municipality all of the state's constitutional police power in land use matters thereby making a constitutional decision implicit. *See* text accompanying notes 59-61 *infra*.

in the area; and it was applicable throughout the entire community. Had the court in *Maldini* dealt with constitutional objections, it would likely have found all the above to be of constitutional importance.[51]

In 1976, the New Jersey Supreme Court decided *Taxpayers Association v. Weymouth Township*[52] and *Shepard v. Woodland Township Committee & Planning Board.*[53] Both cases dealt with age-exclusive housing effected by means of zoning or "quasi-zoning" ordinances designed to meet the needs of older citizens. Although both ordinances had been successfully challenged in the New Jersey Superior Court,[54] the state supreme court reversed the decisions and upheld the ordinances.

In both cases, the ordinances were attacked by resident taxpayers rather than excludees.[55] The ordinance in *Weymouth* prohibited mobile home parks in the township unless constructed and operated in accordance with a number of restrictions. The challenged provisions required that at least eighty percent of the mobile homes in any mobile home park contain no more than two bedrooms and limited occupancy to "elderly persons" or "elderly families." "Elderly persons" was defined as persons aged fifty-two or older; "elderly families" as those headed by a person of such age or by a person who had a spouse of such age.[56] In *Shepard*, the ordinance permitted the construction of "senior citizen communities" in a low-density residential-agricultural district. Occupancy in those communities was limited to persons over fifty-two years of age, except for one child nineteen years of age or older living with his or her parent(s) or guardian(s). Occupancy was limited to no more than three individuals.[57] Construction and design requirements clearly indicated that the communities were designed for more affluent senior citizens.

In both cases constitutional issues based upon both the federal and state constitutions were fully considered. Because of the liberal state standing rules,[58] plaintiffs in both cases were permitted to raise the equal protection and due process rights of younger excludees.

The court in *Weymouth* began its discussion by considering whether the age-exclusive zoning was within the zoning power of the community.

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51. *See* text accompanying notes 136-42 *infra*.

52. 71 N.J. 249, 364 A.2d 1016 (1976).

53. 71 N.J. 230, 364 A.2d 1005 (1976).

54. Taxpayers Ass'n v. Weymouth Twp., 125 N.J. Super. 376, 311 A.2d 187 (1973); Shepard v. Woodland Twp. Comm. & Planning Bd., 128 N.J. Super. 379, 320 A.2d 191 (1974).

55. The taxpayers attacking the ordinance in *Weymouth* were concerned that the presence of mobile home parks in the community would have an adverse effect on property values. A similar concern over a decline in property values as a result of senior citizen communities in a low density residential neighborhood prompted the plaintiffs in *Shepard*. Thus, the taxpayers were seeking to use the age-exclusive nature of the housing to cause its complete removal, rather than to have it "opened up" to excludees.

56. 71 N.J. at 259, 364 A.2d at 1021.

57. 71 N.J. at 234, 364 A.2d at 1008.

58. 71 N.J. at 235, 364 A.2d at 1008 n.1; 71 N.J. at 263, 364 A.2d at 1023 n.5.

While this is, in the first instance, a question of state law,[59] the determination is likely to have federal constitutional implications since the zoning authority granted to the local government by the state enabling legislation usually extends as far as the state's police power with respect to land use matters.[60] Thus, the scope of legitimate activity of the municipality is coterminous with the scope of the state's police power under the United States Constitution. The real question, therefore, is whether the state would have the power to provide age-exclusive housing for the elderly. Another way of stating this is to ask whether the legislation has as its goal a legitimate state purpose—a constitutional requirement for state regulatory action.[61]

In determining whether the purpose of the ordinance was consistent with the general welfare, the court recognized the expansive interpretations given this term by both the United States Supreme Court and the New Jersey courts. In doing so, the court recognized that the concept permitted state action directed toward not only the physical needs, but also the psychological and social needs of its population. Viewing the elderly as having various psychological and social needs that can be met especially well by age-homogeneous housing, the court upheld the ordinance as furthering the general welfare because it met the "special" financial, physical, psychological, and social needs of the older segment of the population.[62]

The court then considered in detail equal protection and due process challenges to the ordinance. For purposes of resolving the equal protection challenge, the court used the "two-tiered" analytical approach. Under this method of analysis, a statutory classification will be upheld if it is rationally related to a legitimate state objective.[63] If, however, the classification involves "suspect" criteria or impinges upon "fundamental rights," the state must assume the burden of showing that the classification serves a "compelling state interest" and is neither over-inclusive nor under-inclusive.[64] Stating that age is not a suspect classification[65] and that housing is not a fundamental right,[66] the court applied the less strict

59. All municipal power is, of course, solely the result of delegation by the state.

60. *See* Note, *supra* note 28, at 437.

61. *See* Roe v. Wade, 410 U.S. 113, 147-52 (1973); *see also* Perry, *Substantive Due Process Revisited: Reflections on (and beyond) Recent Cases*, NW. L. REV. 417, 419-20 (1976). The constitutional requirement of a "legitimate state purpose" under the fourteenth amendment is the same as the "general welfare" requirement under the same amendment. A purpose will only be considered "legitimate" if it furthers the general welfare. *See* Perry, *id.* at 420 n.16.

62. Lower income housing constructed to accommodate older persons, but not restricted to them, would arguably meet the physical and economic needs of the elderly. However, it has been argued that only age-homogeneous housing can meet their psychological and social needs. *See* AGING, June 1974, at 9; HORIZON, Autumn 1973, at 23. *See also* Doyle, *supra* note 10, at 83-84 and authorities cited therein.

63. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 40 (1972).

64. *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970).

65. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

66. *See* Lindsey v. Normet, 405 U.S. 56 (1972).

"rational basis" analysis, concluding that the age limitations were rationally related to the legitimate state objective of providing housing suited to the needs of the elderly.[67] With respect to the substantive due process challenge, the court merely stated that "the claim that the ordinances violate the due process clause is little more than a restatement of the contention that they contravene principles of equal protection"[68] and upheld the ordinance on the basis of the same considerations.

In the final section of the opinion the court considered the effect of its decision in *Southern Burlington County NAACP v. Township of Mt. Laurel.*[69] The court recognized that its decision in *Weymouth* carried with it the danger that zoning might be used by municipalities to restrict new housing to categories of people who are net revenue producers or to restrain increases in school expenditures by directly or indirectly excluding families with children, both condemned in *Mt. Laurel.*[70] The court concluded, however, that the plaintiff did not choose to try the case on a theory of exclusionary zoning, and further stated that a municipality could not provide the opportunity for an appropriate variety and choice of housing for all categories of persons required by *Mt. Laurel* unless it can "design its land use regulations to provide for the unsatisfied housing needs of specific, narrowly defined categories of people."[71]

The *Shepard* case relied heavily upon the reasoning of *Weymouth* for the resolution of the due process and equal protection issues raised by the plaintiffs, and its holding was consistent with the *Weymouth* decision. In addition, however, it expanded upon age homogeneity as a legitimate tool to meet the needs of the older segment of the population. It cited a number of authorities indicating that the psychological and emotional needs of a

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67. The court also found that the ordinance satisfied the more stringent requirements of the New Jersey Constitution. Because the right to housing has a "preferred status" under the state constitution, the court stated that the ordinance deserved "close scrutiny." Nevertheless, it found that the ordinance bore a "real and substantial relationship" to an "appropriate" governmental interest. 71 N.J. at 287, 364 A.2d at 1037.

68. *Id.*

69. 67 N.J. 151, 336 A.2d 713 (1975). The *Mt. Laurel* case was a landmark case dealing with "exclusionary" zoning. It considered the validity of a municipal zoning ordinance that limited residential housing to single family homes on large lots. The ordinance was attacked as a violation of the state zoning enabling act and the state and federal constitutions since it effectively precluded low and moderate income people from residing in the community despite the existence of substantial undeveloped land.

The New Jersey Supreme Court upheld the plaintiff's state claims without reaching the federal constitutional issue. The court stated that under the "general welfare" standard of the enabling legislation and state constitution, a municipality's land use regulations must make proper provision for adequate housing for all categories of people who may desire to live within its boundaries, including those of low and moderate income. 67 N.J. 173-74, 336 A.2d 731-32. At a minimum, the regulations of a developing municipality must insure that the municipality has provided its "fair share" of the present and prospective needs for low and moderate income housing. *Id.*

70. *Mt. Laurel* was decided on the basis of the New Jersey Constitution. No United States Supreme Court case has invalidated non-racially motivated exclusionary zoning. *Cf.* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (intent to discriminate necessary to require rezoning to accommodate low and middle income multi-family housing).

71. 71 N.J. at 293, 364 A.2d at 1040.

large segment of the older community are met by age-restrictive housing[72] and concluded that age restrictions are "both rationally related to the concept of planned housing for the elderly and essential to the success of such developments."[73] The court also noted that the ordinance was not intended to preclude other classes of people from residing within the community, but was intended to provide housing for a specific category of people.[74]

The most recent zoning case was decided in 1977 by the Appellate Division of the New York Supreme Court. In *Campbell v. Barraud*,[75] the court, as in the New Jersey cases, squarely faced the constitutional questions raised by age-restrictive housing. The town of Brookhaven amended its zoning ordinance by rezoning a ninety-six acre parcel as a Planned Retirement Community (PRC), and limited occupancy in the PRC district to persons fifty-five years of age or older.[76] As in *Weymouth* and *Shepard*, the plaintiffs were not excludees, but residents of the township. They were, however, permitted by the court to raise the constitutional objections of excludees.

Relying upon *Maldini v. Ambro*, the court stated that it is within the zoning power to provide housing accommodations designed to satisfy the economic, physical, psychological, and social needs of the elderly. Further, the court noted that it would be "illogical to encourage the construction of housing geared to the specialized needs of the elderly and then prohibit its exclusive use by [that] group."[77] Thus, the age restriction was rationally related to the laudatory and legitimate state purpose of providing housing for the elderly, and the equal protection clause was satisfied, since age did not constitute a suspect class.[78] The courts stated that even though the ordinance established a separate zoning district, it did not establish an age-segregated community "in any but the most strained sense of the word"[79] since the effect of the ordinance was no different than if the PRC had merely been a *permissible* use in a general residence district.[80] Finally, the court emphasized that neither the intent nor the effect of the ordinance was to discriminate against any other group in the township that suffered from exclusion or disadvantaged in its own housing needs.[81]

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72. *Id.* at 240-43, 364 A.2d at 1010-12.

73. *Id.* at 246, 364 A.2d at 1014.

74. *Id.* at 243, 364 A.2d at 1013.

75. 58 App. Div. 2d 570, 394 N.Y.S.2d 909 (1977).

76. *Id.* at 570, 394 N.Y.S.2d at 911. The ordinance also permitted spouses under age 55 and grandchildren over age 19 to reside in the PRC.

77. *Id.* at 572, 394 N.Y.S.2d at 912.

78. *Id.* The court did not consider whether the classification impinged upon any fundamental rights.

79. *Id.* at 572, 394 N.Y.S.2d at 913.

80. *See* note 28 *supra*, and the Note cited therein.

81. 58 App. Div. 2d at 573, 394 N.Y.S.2d at 913. *See* Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

A number of factors can be extracted from these zoning cases that may have implications for age-restrictive housing outside the context of retirement communities. First, only one of the ordinances considered was applicable throughout the entire area controlled by the zoning authority and it was the only ordinance ultimately invalidated. Second, in the only case in which the purpose of the ordinance was not to satisfy the housing needs of a segment of the community, the restrictions were struck down. In all of the cases in which age restrictions were upheld, the courts explicitly recognized that the ordinance at issue would not result in the imposition of a burden on other significant segments of the community in meeting their housing needs.

Another important factor is that each of the courts upheld the validity of administering to the needs of a particular segment of the populace to the exclusion of others. While this is not surprising, since most federal and state programs administer to the particular needs of only portions of the population,[82] it is noteworthy that the courts viewed it as legitimate to consider social and psychological needs as well as economic and physical ones, since age-restrictive housing is often proposed as satisfying such needs.[83] This result seems well supported by the United States Supreme Court case of *Village of Belle Terre v. Boraas*.[84]

Bell Terre is a small Long Island community[85] that restricted permissible uses of its land (less than one square mile) to single-family dwellings. "Family" was defined in the relevant ordinance as no more than two persons unrelated by blood, adoption, or marriage, living and cooking together as a single housekeeping unit.[86] There was no limit on the number of related persons who could occupy a household.

Six students at the State University of New York at Stony Brook attacked the ordinance as infringing upon their constitutional rights. They asserted that the ordinance interfered with their right to travel, restricted their freedom of association, interfered with their right to privacy, and denied them equal protection of the law. Justice Douglas, writing for the majority, summarily dismissed all these objections.[87] Then, in discussing the legitimacy of addressing land use policy to family needs, he wrote: "The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and

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82. *See, e.g.*, Agricultural Adjustment Act of 1938, 7 U.S.C. § 1303 (1976) (authorizing "parity payments" to farmers); 7 U.S.C. §§ 1421-49 (1976) (authorizing price supports for certain agricultural commodities); Servicemen's Readjustment Act of 1944, 38 U.S.C. §§ 1801-27 (1976) *as amended in* 38 U.S.C.A. §§ 1801-27 (West Supp. 1979) (authorizing loan guarantees and direct loans to veterans for home construction).

83. This is particularly true in the case of retirement communities. *See* text accompanying notes 150-63 *infra*.

84. 416 U.S. 1 (1974).

85. The village contained only 220 homes and approximately 700 people. 416 U.S. at 2.

86. *Id.*

87. *Id.* at 7-8.

the blessings of quiet seclusion and clean air make the area a sanctuary for people."[88]

This passage strongly indicates that communities may design land use such that certain areas are developed consistent with the needs and values of only a portion of the community, to the exclusion of the needs and values of other segments. Although it is not clear what Justice Douglas meant by "family values" and "youth values," it is clear that such values are not shared by the entire population, especially if his remarks were at all directed toward the values generally associated with the traditional nuclear family. While "quiet seclusion" and "clean air" are arguably valued more universally, some persons wishing to live in the community may value other things—presently incompatible with quiet seclusion and clean air—even more highly. Thus, some people wishing to live in Belle Terre or similar communities because of proximity to a university or place of work might not accept the values around which that community's land use has been designed. Under the *Belle Terre* decision, they have no constitutional complaint.

Because of the brevity of the *Belle Terre* opinion, it is difficult to derive more from it than the proposition that very small communities may limit land use to modes designed exclusively for the preservation of "family needs," and may do so to the exclusion of those whose needs (or desires) are not familial. However, even such a narrow reading would seem to establish the legitimacy of reserving at least a small portion of land within any community to meet the peculiar needs of only a portion of the populace, even if the "needs" are largely psychological or emotional. Whether this reasoning can be extended to permit a municipality to zone a portion of its land to meet the "needs" of those whose psychological well-being is detrimentally affected by the presence of children is obviously another matter, and one that is explored in the next sections of the article.[89]

B. Moore v. City of East Cleveland

In 1977, the United States Supreme Court decided the case of *Moore v. City of East Cleveland*,[90] which has significant implications for age-restrictive housing. The case concerned a housing ordinance applicable throughout the entire city of East Cleveland, Ohio, that limited occupancy of dwellings to members of a single family and made violation a criminal offense. The complex definition of "family" excluded certain extended

88. *Id.* at 9.

89. *See* text accompanying notes 102-49 *infra*. This is not to suggest that psychological well-being is the only interest which may be served by age-exclusive housing. As will be examined later, there are also arguments that age-restrictive housing may enhance the physical safety and comfort of the resident population and may also be in their financial interest. Whether such interests can be furthered consistent with the general welfare, however, is problematic. *See* text accompanying notes 164-66 *infra*. The reason that I have concentrated on social and psychological benefits is that they are likely to be the most questionable in terms of their legitimacy as a state interest.

90. 431 U.S. 494 (1977).

family arrangements, such as two children, related as first cousins but not as brothers living with their grandmother—the defendant's situation. The grandmother was told by local authorities that she would have to leave the city or face criminal prosecution. When she refused to leave she was prosecuted, and her conviction was upheld by the Ohio Supreme Court. She then appealed to the United States Supreme Court.

Justice Powell wrote the opinion for a plurality of the Court, in which three other Justices joined. Justice Stevens wrote a separate concurrence, and four Justices dissented. Justice Powell began the opinion by immediately distinguishing *Belle Terre*, stating that *Belle Terre* had the effect of excluding only *unrelated* individuals. East Cleveland, in contrast, by making a grandmother's choice to live with her grandson a crime, had "chosen to regulate the occupancy of its housing by slicing deeply into the family itself."[91] Citing a "host of cases,"[92] he stated that when the government undertakes intrusive regulation of the family, "the Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulations."[93]

The city sought to justify the ordinance as a means of preventing overcrowding, minimizing traffic congestion, and avoiding financial burden on the school system—purposes that Justice Powell characterized as legitimate.[94] He then demonstrated, however, the gross under- and over-inclusiveness of the ordinance[95] and concluded that the ordinance had only a "tenuous" relationship to the conditions it sought to alleviate, serving them "marginally, at best."[96] In the final portion of the opinion he justified the application of a stringent substantive due process review[97] by including the extended family among the beneficiaries of the constitutional protection accorded to marriage, family, and procreation: "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."[98] After reciting some of the potential values inherent in the

91. *Id.* at 498.

92. *Id.* Justice Powell discussed none of the 13 cases cited in detail.

93. 431 U.S. at 499.

94. *Id.* at 500.

95.

> For example, the ordinance permits any family consisting only of husband, wife, and unmarried children to live together, even if the family contains a half dozen licensed drivers, each with his or her own car. At the same time it forbids an adult brother and sister to share a household, even if both faithfully use public transportation.

431 U.S. at 500.

96. *Id.*

97. In order to withstand constitutional attack, *all* state regulatory action must have a rational connection to a legitimate state interest. In other words, the purpose of the regulation must be a legitimate one and the legislation must serve to accomplish the purpose in at least one conceivable case. The test applied in *Moore*, however, was much more exacting than this minimum. *See* 431 U.S. at 499.

98. *Id.* at 504.

extended family, he concluded that "the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns."[99]

This case has been read by Professor Doyle to sound the death knell for age-restrictive housing,[100] at least where age homogeneity is accomplished through the use of zoning, or similar municipal powers.[101] While the case does establish some limitations upon the establishment of age-restrictive housing through the use of such powers, I believe that Professor Doyle reads the case, and those cases used by the Court to support its holding, too broadly. While I could begin by discussing the obvious factual distinctions between the *Moore* case and, for example, an ordinance that establishes a district as an "adult community" where occupancy by children was not permitted, such a discussion is best accomplished within the context of the methodology employed by the Supreme Court and other federal courts when claimants assert that actions of the state impinge upon their substantive due process rights. In this context, significant constitutional distinctions exist between the *Moore* ordinance and "adult community" zoning in which a municipality sets aside a small portion of its land for "child-free" living and, in so doing, does not substantially diminish the housing opportunities for families with children within the community at large.

IV. THE DUE PROCESS STANDARD

The express basis for the decision of the Court in *Moore* was the due process clause of the fourteenth amendment, not the ninth amendment nor "penumbras" of one or more of the amendments.[102] It acknowledged explicitly the right asserted as one protected by the fourteenth amendment's concept of personal liberty. In examining the due process standard employed by the Court, it is significant that in only one case[103] relied upon in *Moore* has the Court clearly applied a "two-tier" method of due process analysis simliar to that utilized in equal protection cases, and required that an infringement upon a fundamental interest protected by the due process clause be supported by a compelling state interest and be the least restrictive alternative.[104] Perhaps recognizing that the interests protected under that clause do not lend themselves to easy definition,[105] the Court

99. *Id.* at 506.

100. *See* Doyle, *supra* note 10, at 97.

101. Professor Doyle feels that age homogeneity may be accomplished through the use of restrictive covenants running with the land, since she does not believe that the requisite state action is present for the invocation of constitutional guarantees. *See* Doyle, *supra* note 10, at 105. I disagree to some extent with this conclusion. *See* text accompanying notes 194-230 *infra*.

102. *See* Griswold v. Connecticut, 381 U.S. 479, 483-84 (1965).

103. Roe v. Wade, 410 U.S. 113 (1973).

104. *Id.* at 155.

105. *See* text accompanying notes 130-32 *infra*.

has adopted, both in word[106] and practice, a much more flexible approach than its asserted mode of analysis in the equal protection cases. Like the expansive language of the clause itself, interests such as marital privacy, procreation, and the right to travel are themselves expansive concepts, and it is difficult to conceive of a governmental action that does not affect them in some way. Rather, interests bound up in the fourteenth amendment's concept of individual liberty are far more amenable to an approach that incorporates the various manifestations of these interests and the numerous ways in which government action can infringe upon them. While the Court has never explained in detail its methodology in deciding substantive due process cases, its approach is, for lack of a better phrase, a "balancing test,"[107] involving far more subtle determinations than the seemingly more mechanical "two-tier" approach of equal protection analysis.[108]

The genesis of this approach is the definition of the liberty interest protected by the fourteenth amendment, as set out in *Meyer v. Nebraska*:[109]

> While this Court has not attempted to define with exactness the liberty thus guaranteed . . . it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[110]

In short, the right protected in *Meyer* is the right to go about one's life without *undue* interference by the state. Given this description of the liberty interest protected, it is hardly surprising that the mechanism by which these interests are protected must exhibit significant flexibility, and, in fact, the language of the cases themselves generally suggest this flexibility.[111] Justice Powell's recitation of the appropriate test in *Moore* is not couched in language of the equal protection cases,[112] but rather in language suggesting a more subtle approach.[113]

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106. The Court, however, has never disavowed the language of *Roe* or the test applied in that case.

107. *But see* Perry, *supra* note 61, at 420-21.

108. It is, of course, somewhat misleading to characterize the Court's mode of analysis in equal protection cases as either "mechanical" or rigidly "two-tiered." Especially in the area of sex discrimination, the approach of the Court can no longer be described as dichotomous. *See, e.g.*, Orr v. Orr, 47 U.S.L.W. 4224, 4227 (March 5, 1979); Reed v. Reed, 404 U.S. 71 (1971). *See also* note 112 *infra*.

109. 262 U.S. 390 (1923).

110. *Id.* at 399.

111. *But see* Roe v. Wade, 410 U.S. 113 (1973).

112. In a sense, almost all legislation establishes classifications. Therefore, a claim that legislation violates substantive due process rights is probably translatable into the rhetoric of equal protection. For example, the plaintiff in *Moore* could have argued that the ordinance in that case established a classification based upon family relationship and treated the respective classes differently. Since such a classification impinged upon a fundamental right, the Court should adopt the rigorous "strict scrutiny" approach. Perhaps this interchangeability is why the Court has adopted, to some

Perhaps the most explicit use of the balancing approach came in the case of *Nixon v. Administrator of General Services.*[114] In that case the Court considered the constitutionality of the Presidential Recordings and Material Preservation Act,[115] which gave custody of the Nixon tapes to the Administrator of the General Services Administration. In disposing of the claim that the Act unconstitutionally invaded the former President's right to privacy,[116] the Court acknowledged that Nixon did have a constitutionally protected privacy interest in the tapes. The court then stated:

> But the merit of appellant's claim of invasion of his privacy cannot be considered in the abstract; rather, the claim must be considered in light of the specific provisions of the Act, and any intrusion must be weighed against the public interest in subjecting the Presidential materials of appellant's administration to archival screening.[117]

There are other examples in recent opinions of the Court, and its individual Justices, of the nature of the test used to determine whether a state action interferes with substantive due process rights.[118] More important, however, is the recognition that, given the nature of the interests to be protected, a flexible approach by the Court is necessary to avoid imposing unacceptable constraints on the political process. That is, a rigid "two-tier" analysis would first require a decision whether an asserted interest was entitled to stringent or minimal substantive due process protection. Presumably, this would be determined without considering any factors other than the nature of the interest itself.[119] Assuming the interest was entitled to stringent due process protection, the state would be

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extent sub silentio, a flexible approach to equal protection cases as well. *See, e.g.*, Bullock v. Carter, 405 U.S. 134 (1972); Reed. v. Reed, 404 U.S. 71 (1971). *See also* Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 324 (1978)(Brennan, White, Marshall, and Blackmun, JJ., concurring and dissenting). For a more complete discussion of the interchangeable nature of the equal protection and substantive due process concepts, see Yarbrough, *The Burger Court and Unspecified Rights: On Protecting Fundamental and Not-So Fundamental "Rights" Through a Flexible Conception of Equal Protection*, 1977 DUKE L. J. 143, 162-63.

113. "But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." 431 U.S. at 499.

114. 433 U.S. 425 (1977).

115. Pub. L. 93-526, 88 Stat. 1695 (codified at 44 U.S.C. § 2107 (1976)).

116. While the right to privacy was not discussed in the context of the fourteenth amendment due process guarantee in the *Nixon* case, the reliance of the Court on Whalen v. Roe, 429 U.S. 589 (1977), makes it clear that the privacy right in the case has its genesis in the fourteenth amendment. *See* Whalen v. Roe, 429 U.S. at 589, 598-99 n.23 (1977).

117. 433 U.S. at 458. *See also* Plante v. Gonzalez, 437 F. Supp. 536 (N.D. Fla. 1977), *aff'd*, 575 F.2d 1119 (5th Cir. 1978), in which the court relied upon the *Nixon* case to expressly adopt a balancing test with respect to the infringement by the government upon the privacy interest.

118. *See* Moore v. City of East Cleveland, 431 U.S. 494, 547-48 (1977) (White, J., dissenting); Kelley v. Johnson, 425 U.S. 238, 249 (1976) (Powell, J., concurring); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 640 (1974).

119. Under the "two-tier" analysis, the determination whether the right involved is "fundamental" functions as a condition precedent to the application of the appropriate level of scrutiny, rather than as a part of the test of constitutional validity itself.

120. *See* Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting).

put to the virtually impossible[120] task of demonstrating the furtherance of a compelling state interest and the use of the least restrictive alternative. On the other hand, if recognition of the interest as "fundamental" under the Constitution was not forthcoming, the state would only have to meet the burden of showing that the action furthered some conceivable state interest, regardless of the degree of infringement, the weakness of the governmental interest asserted (as long as the Court was willing to concede that the interest was "legitimate"), or the gross under- or over-inclusiveness of the swath cut by the statute. Otherwise, if such factors were considered in determining the protection to which the interest was entitled, a balancing would occur sub silentio.[121] Under such a rigid "two-tier" approach the Court has two alternatives. It can say that a particular interest, *e.g.*, the right to wear one's hair at any length, enjoys constitutional protection as a fundamental right, in all circumstances and under all conditions (since the sole focus of the Court at this stage of the analysis is on the interest itself); or, it can decide that the state may legislate hair length to any degree it chooses, regardless of the number of persons affected, as long as it can demonstrate that, at least in some circumstances, it serves a legitimate governmental interest, perhaps even an aesthetic one.[122] Such a result would be intolerable, and obviously has not occurred in the cases.[123]

What has occurred is that all the factors mentioned above have been weighed in the decisional process. When the courts have purported to use a "two-tier" analysis, these factors have been considered in determining whether the interest abridged by the state action constituted a fundamental right. Thus, courts have inquired whether a "serious" abridgement has occurred,[124] whether the infringement was "incidental" or "direct,"[125] and whether the state action constituted a "penalty."[126] All these issues are, of

121. *Cf.* Sosna v. Iowa, 419 U.S. 393, 419 (1975) (Marshall, J., dissenting) (application of an *ad hoc* balancing test in equal protection case criticized).

122. *Cf.* Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (protection of the "blessings of quiet seclusion").

123. *But cf.* Kelley v. Johnson, 425 U.S. 238 (1976). In *Kelley*, the Court accepted the contention of the Commissioner of the Suffolk County Police Department that hair length regulations furthered the legitimate state interest of esprit de corps within the department, even though it was the president of the policemen's union in his official capacity who challenged the regulations. 425 U.S. at 254-55 (Marshall, J., dissenting). Thus, it is clear that the Court will not require much in the way of state justification when it views the interests to be protected as "minor."

124. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 256-57 (1974). *See also* Hawes v. Club Ecuestre El Comandante, 535 F.2d 140 (1st Cir. 1976); Prostrollo v. University of S.D., 507 F.2d 775 (8th Cir. 1974), *cert. denied sub nom.* Prostrollo v. Bowen, 421 U.S. 952 (1975).

125. *See* Moore v. City of East Cleveland, 431 U.S. 494, 498 (1977) (result of ordinance not "incidental"). *Cf.* Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961) (incidental effect on first amendment rights upheld). *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 652 (1974) (Powell, J., concurring); Cervantes v. Immigration & Naturalization Serv., 510 F.2d 89 (10th Cir. 1975); Robles v. Immigration & Naturalization Serv., 485 F.2d 100, 102 (10th Cir. 1973). *But see* Keckeisen v. Independent School Dist. 612, 509 F.2d 1062 (8th Cir.), *cert. denied*, 423 U.S. 833 (1975); White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).

126. *Compare* Dunn v. Blumstein, 405 U.S. 330 (1972) *and* Shapiro v. Thompson, 394 U.S. 618 (1969) *with* Maher v. Roe, 432 U.S. 464 (1977). *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 652 (1974) (Powell, J., concurring).

course, logically unrelated to the question whether an interest is in the first instance a fundamental right deserving heightened constitutional protection.[127]

Similarly, the issue of the over- or under-inclusiveness of the statute would generally deserve little discussion, assuming the actual existence of a rigid "two-tier" methodology. Either the statute must "fit like a glove" (if the more onerous test is applicable) or else it must only further a legitimate state interest in at least one conceivable case. In reality, however, this factor has been utilized in a more subtle manner, and the extent to which the Court requires a "close fit" seems to be closely related to the nature and degree of infringement and the nature of the right asserted.[128]

While the Court has been applying a balancing approach in substantive due process cases, and has even seemed to recognize its analysis as such in some cases,[129] it has not moved completely from the dichotomy of fundamental/non-fundamental rights as a "triggering" concept.[130] Consequently, confusion has resulted regarding the methodology actually being employed in a particular case and to be employed in future cases. Should the Court recognize the fundamental nature of the substantive due process test as a balancing process of numerous factors, and delineate those factors it feels are critical to any substantive due process inquiry, the result would be a significant doctrinal improvement over the present process, which seems to recognize and utilize a balancing process without revealing, as best it can, the nature of the balance. To those who might object that this would, in effect, grant the Court carte blanche to invalidate state legislation, it need only be said that the Court already has that power, both in terms of its constitutional prerogatives and in terms of the present methodology actually utilized. Presently, if the Court finds that the interest asserted is within the protection of such encompassing terms as, for example, the right to privacy or the right to "raise a family," the legislation rarely, if ever, survives. Yet as a *definitional* matter, it is hard to argue with any decision of the Court either placing or refusing to place an asserted interest within the scope of such terms, since their definitional scope is difficult to describe and subject to disagreement. If the argument is whether the particular interest is sufficiently *important* to come within the ambit of these terms, their invocation in the decisional process merely confuses the issue. It is no different, and much clearer from an analytical viewpoint, to inquire whether the specific interest infringed upon is sufficiently important to be considered a protected "liberty" under the fourteenth amendment. Therefore, it should be explicitly recognized by the Court that any state infringement upon a person's right to do as he pleases presents a potential

127. *See* note 119 *supra.*

128. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 500 n.7 (1977).

129. *See* text accompanying notes 114-18 *supra.*

130. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 502-05 (1977).

due process question. This would free the Court to consider all the factors it now considers on a somewhat ad hoc basis in a manner that will have continuity from case to case.

Notwithstanding the clarity that an explicit balancing test with an express enumeration of relevant factors to be included in the process might bring, it is sufficient for purposes of this article to have established that at least some kind of balancing operation, more sophisticated certainly than the process elucidated in *Roe v. Wade*,[131] is occurring, and to have established some of the factors that the Court considers in the process.[132]

When viewed in this perspective, it is easier to understand the result in *Moore v. City of East Cleveland* and to predict the response of the Court to various other situations concerning age-restrictive housing established by zoning ordinances. *Moore* dealt with the direct determination by the state of the relative legitimacy (or at least desirability) of alternative family relationships. The ordinance was applicable throughout the entire city, and therefore no claim could be made that the state was merely recognizing differences in familial relationships and seeking to accommodate them without indicating a preference. Further, the specific individual interest asserted was an important interest, both to the particular claimant and when viewed from broader historical and socioeconomic perspectives. In addition, though the interests asserted by the state were "legitimate," they were astonishingly ill-served by the challenged ordinance, to such an extent that Justice Stevens, in a separate concurrence, determined that the ordinance could not even withstand the most limited standard of due process review requiring a means reasonably related to the ends sought to be achieved.[133] Given the nature of the interest asserted, it is hardly

131. 410 U.S. 113 (1973). *See* text accompanying note 103 *supra*.

132. Although a full discussion of possible objections to the adoption by the Court of a more explicit balancing test is beyond the scope of this paper, I would like to deal briefly with the most obvious one.

It has been suggested that an explicit balancing test would lack the clarity of a "two-tier" approach: that is, one would have no way of predicting the balance the Court would strike in a particular case. There are a number of responses to this. First, even under an explicit balancing test, there is no reason why the recent tradition of non-interference with social and economic legislation should not continue. The legitimacy of governmental action in these areas is no longer questioned, and the importance of the economic well-being of society is clearly an important state interest. In addition, it is this type of legislation that courts are least equipped to evaluate, and, therefore, it is in these cases that the presumption of validity should be the strongest.

Second, a specific delineation of the factors that the Court considers important for purposes of constitutional due process analysis would assist in the prior evaluation of a claim. In addition, the mode of analysis in weighing the relevant factors would become increasingly well-defined as specific cases were decided. *See* Yarbrough, *supra* note 112, at 163.

Finally, the short answer is that uncertainty clearly exists now, although its focus is perhaps somewhat different than that which may be created by an explicit balancing test. The uncertainty regarding how the Court will define the asserted right, that is, narrowly or broadly, may be crucial in determining whether the right will be viewed to be "fundamental." *See, e.g.*, Wyman v. James, 400 U.S. 309, 325 (1971). As pointed out in the text, the Court has already adopted some kind of balancing process, thus leading to substantial uncertainty at present.

133. 431 U.S. at 520 (Stevens, J., concurring). It is possible, in view of the ill-devised nature of the ordinance, that but for the existence of the *Belle Terre* case, the full Court would have invalidated the ordinance under this standard. The ordinance in *Belle Terre*, however, was probably no better suited to its purposes than the ordinance in *Moore*, and, as a result, the Court could not invalidate it on the basis of the rational relationship test.

surprising that, the Court invalidated a state action that so significantly intruded upon a person's liberty while accomplishing so little. Had the Court not been encumbered by the "fundamental/non-fundamental" dichotomy of *Roe v. Wade*, Justice Stewart would not have been placed in the difficult position of deciding whether the right to live with one's grandchildren was a "fundamental" one.[134] Rather, the Court could have recognized the interest as an important one, which it clearly is, acknowledged the danger of direct state determination of the relative desirability of family arrangements, and indicated that the ordinance, while accomplishing little, caused substantial unnecessary hardship by its over-inclusiveness. Under such an analysis, despite a strong presumption of legislative validity which should still be accorded the state in the context of an explicitly recognized due process balancing test,[135] the ordinance would have failed.

In the context of a due process analysis such as the one outlined above, the constitutional differences between a case such as *Moore* and cases such as *Weymouth* become clear. The establishment of age-restrictive communities is not a direct statement by the state of which family relationships are preferable, especially when the restricted area represents only a small portion of the community. Instead, it is simply a recognition that some of its citizens prefer certain family relationships and an attempt to accommodate their desires and needs. The effect of the state action on family relationships is arguably an "indirect" one,[136] defining occupants not by the closeness of the relationship, but by the age of the occupant.[137] The size of the restricted area is also important for reasons other than the necessary implication of state preference which arises when such restrictions are applicable throughout an entire community. It serves in part to define the degree of interference with the asserted right of the excludee to raise his or her family in a particular area. Obviously, it is a substantially lesser infringement to be denied access to a ninety-six acre parcel than to be denied access to an entire city.[138] In all the zoning cases in

134. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 537 (1977) (Stewart, J., dissenting).

135. This presumption should remain the strongest in those cases where courts are least equipped to balance the competing interests. While these have been described as "business, economic, and social affairs," *see* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952), such categorization language is probably overbroad. It is probably safe to say, however, that legitimately debatable policy decisions in areas requiring the application of technical expertise to empirical data should enjoy a very strong presumption of validity.

136. *See* cases cited in and text accompanying note 125 *supra*.

137. Of course, the nature of the particular restriction will be relevant to this inquiry. Certainly it is unlikely that many grandchildren will be living with grandparents if there is an absolute bar on persons under 55 years of age. Thus, the restriction would have essentially the same effect as explicitly barring grandchildren from residing with their grandparents, and this effect cannot meaningfully be termed "incidental." This would not be true, however, if the minimum age were 12.

138. *See* Moore v. City of East Cleveland, 431 U.S. 494, 550 (1977) (White, J., dissenting). Professor Doyle views as "unpersuasive" any distinction based upon whether the municipality has chosen to adopt age restrictions applicable throughout the entire municipality or only a portion of it. She believes that such a distinction would lead to the anomalous result in which a large subdivision might be validly designated as age-restrictive while a town of smaller size might not. Doyle, *supra* note 10, at 95 n.125.

I am not convinced by her argument. While such "anomalies" may be created, they are inherent in

which restrictions were upheld, the courts, albeit for purposes of state law, emphasized that the challenged ordinance had little or no effect upon the availability of housing *within the community as a whole*. I believe this to have significance for purposes of federal constitutional law as a potential indicator of the degree of state infringement. In practical terms, by focusing on the issue of whether the entire community is age-restrictive, or only a small portion of it, and refusing to permit an entire community to be age-restrictive, the Court can prevent a "snowballing" effect; that is, while a small exclusively age-restrictive community may not be unreasonably intrusive, since there are feasible housing opportunities for excludees in easily accessible surrounding communities, the cumulative effect, if each community would adopt such restrictions, would be gravely intrusive.[139]

The relative strength of the state interests asserted in *Moore* and those asserted by a state establishing age restrictions may vary considerably. An ordinance that establishes a restricted area for low-income elderly when it is demonstrated that there are significant numbers of such people in the community in need of housing may be entitled to substantially more weight than the state interests asserted in *Moore*.[140] Additionally, the gross over- and under-inclusiveness of the ordinance in *Moore* may or may not be present in an age-restricted district, and is especially unlikely to be present within the context of a retirement community. Finally, the correlation between children and the types of activities that the elderly (or at least a substantial portion of them) find psychologically disruptive must be high.[141] Thus, there is much of constitutional dimension to distinguish the establishment of a retirement community from the ordinance invalidated in *Moore*.[142]

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the legitimacy of local zoning. Certainly the right to live with one's family is not so fundamental that it encompasses the right to live in a particular neighborhood or portion of a municipality. Otherwise, it is unlikely that the Court would permit the justifications for traditional zoning, which may act to exclude people from particular segments of a town, to interfere with such a right. Therefore, as long as the result reached as a result of such "anomalies" is not entirely unreasonable, it should generally be sufficient to uphold the ordinance if only a small portion of the municipality is age-restrictive. And if the result is totally unreasonable, it should be struck down under the balancing test discussed in the text. It should also be mentioned that the courts that have invalidated exclusionary zoning practices have not required that the municipality dispense with all differences in residential classifications, thereby permitting a person to live with his or her family any place he chooses; rather, the courts have required that a municipality provide its "fair share" of regional needs. *See, e.g.*, Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975).

139. The Court could also consider the geographic jurisdiction of the zoning authority in relation to the area affected by the restrictions as a factor to be weighed in the balance. *See* note 138 *supra*.

140. While it might be argued that the state can meet the needs of such people by establishing sufficient low income housing to meet the needs of all age groups on an age-neutral basis, it may be that the needs of the elderly poor differ from those of other poor people in such a way that they can only be met by age-restrictive housing. *See* text accompanying notes 150-66 *infra*.

141. *See* Doyle, *supra* note 10, at 97 n.127.

142. It is also significant that the opinion of Justice Powell in *Moore* represented only a plurality of the Court. Justice Stevens found the ordinance wanting under the standard of review traditionally applicable to zoning cases. 431 U.S. at 514 (Stevens, J., concurring). Therefore, it is highly problematic whether a majority of the Court views the interest asserted in *Moore* to be deserving of increased scrutiny.

It should again be emphasized that, while it is suggested by the author that the Court be more explicit in its use of a balancing approach to questions of substantive due process, the importance of the balancing process to the present inquiry is not that it *should be* used by the Court, but rather that it constitutes the present methodology of the Court. The Court has undertaken to evaluate the relative importance of various state interests, [143] and to consider in the decisional process the degree[144] and "directness"[145] of the infringement. It has also considered the extent to which a legislative action is under- or over-inclusive beyond that which is necessary to satisfy a "two-tier" approach.[146] In some cases it has attempted to fit a consideration of these factors into the dichotomy of fundamental versus non-fundamental rights, admittedly a difficult proposition.[147] At other times, it has merely discussed them without indicating the theoretical basis for their significance,[148] and in still other cases the language of the Court expressly admits of some balancing process.[149] Viewed in this way, while *Moore* indicates that the Court regards the ability of a person to determine his or her appropriate family relationship without suffering the "penalty" of being required to live elsewhere as an important interest, it certainly does not mandate the invalidation of all age-restrictive housing, even when accomplished pursuant to direct state action, such as use of the zoning power.

V. THE GENERAL WELFARE QUESTION

The police power of the states is limited to those actions bearing a real and substantial relationship to the general welfare.[150] This limitation on the use of governmental power has its foundation in the due process clause of the fourteenth amendment, and is essentially the equivalent of the equal protection notion that a statute must serve a *legitimate* state interest.[151] It has been adequately demonstrated in a prior section of this article[152] that a governmental action can be directed at satisfying the needs of only a portion of the governed population, even if such needs are primarily social or psychological, and still meet the "general welfare" standard of the

143. *See* Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977). *Cf.* Reed v. Reed, 404 U.S. 71, 76 (1971) (equal protection case).

144. *See* cases cited in note 124 *supra.*

145. *See* cases cited in note 125 *supra.*

146. *See* note 128 and accompanying text *supra.*

147. *See* text accompanying notes 130-32 *supra.*

148. *Cf.* Moore v. City of East Cleveland, 431 U.S. 494, 498 (1977) (theoretical significance of whether effect was incidental or not was not discussed).

149. *See* text accompanying notes 114-18 *supra.*

150. Mugler v. Kansas, 123 U.S. 623, 661 (1887). The "general welfare" or "public welfare" limitation to the police power has been developed at some length by Professor Perry in *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689, 693-707 (1976).

151. *See* Perry, *supra* note 150, at 706 n.83.

152. *See* text accompanying notes 84-89 *supra.*

Constitution. A further factual inquiry, however, remains. First, assuming that a statute is not automatically unconstitutional merely because it seeks to satisfy the needs of only a portion of the population, whether the legislature has made a plausible factual determination that the statute will accomplish its purpose, that is, to satisfy these needs. Second, even assuming it accomplishes its purpose in some individual cases, whether the societal costs are so substantial and the benefits to the affected group so meager that it is implausible to believe that the statute bears a real and substantial relationship to the *general* well-being of the society.[153]

The literature on the effect of age-homogeneous living deals almost entirely with retirement communities, or similar environments in which "senior citizens" constitute the relevant age-homogeneous group. While there is some debate concerning whether such age homogeneity is beneficial to the residents of such communities, it is fair to say that most of the literature has concluded that there are significant psychological, social, and economic benefits that result from the age-restrictive nature of the community.[154] A number of studies have revealed that morale among persons in retirement communities is generally higher than among those in age-integrated communities, even when other socioeconomic facters are controlled.[155] While this may be partially a result of self-selection,[156] at least a portion of the result has been accorded to the age homogeneity of the environment. The same studies have demonstrated that retirement communities actually facilitate the level of social interaction among the residents. There are large numbers of potential replacements for friends

153. This second inquiry, of course, involves a balancing of some of the same considerations discussed in connection with the question whether a particular statute can *ultimately* survive a substantive due process challenge. *See* text accompanying notes 102-49 *supra*. However, satisfaction of a standard that asks whether there is some factual basis for the legislative decision that the statute will serve the general welfare does not guarantee that the statute will pass substantive due process muster. Rather, this is a threshold inquiry much the same as the initial inquiry in equal protection cases that seeks to determine if the statute plausibly serves a legitimate state interest. If this threshold test is not satisfied, the inquiry proceeds no further and the statute is invalidated. *See, e.g.*, Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1976).

It is possible, however, to merge the threshold inquiry and the "second level" test of ultimate legitimacy merely be assuming that a statute which substantially interferes with an important individual interest can never bear a real and substantial relationship to the general welfare. It is, however, possible to conceive of statutes that would only affect a small number of people on infrequent occasions, but would, on those occasions, result in a profound intrusion into a vital individual interest. Such a statute might result in significant benefits to the general populace and enjoy the support of a large majority of affected persons, but still be invalid under the fourteenth amendment. In such a situation it would be plausible to say that the statute satisfies the threshold test of a real and substantial relationship to the general welfare, and is still invalid under the due process clause. *Cf.* Wisconsin v. Yoder, 406 U.S. 205, 214-15 (1972) (only state interests of the highest order can overbalance legitimate claims to free exercise of religion). *But see* Perry, supra note 61, at 420-21.

Regardless of the methodology adopted in resolving substantive due process questions, the discussion in this section is relevant to a resolution of the problem.

154. *See, e.g.*, Sherman, Mangum, Dodds, Walkley & Wilner, *Psychological Effects of Retirement Housing*, 8 GERONTOLOGIST 170 (1968); *see also*, Doyle, *supra* note 10, at 82 n.75 and authorities cited therein.

155. Bultena & Wood, *The American Retirement Community: Bane or Blessing*, 24 GERONTOLOGY 208 (1969).

156. *Id.* at 211-13.

lost late in life through death, migration, or ill health,[157] and such communities are often designed in other ways to encourage social contact. In addition, age homogeneity facilitates the development of a normative system peculiarly suited to the needs of the older citizen. The conflict often experienced by older persons between the instrumental, or "work ethic," values of their youth and of the younger persons around them, and the more relaxed, leisure-oriented values that many older persons seek may be mitigated by age homogeneity.[158] In a sense, the age homogeneity serves as a buffer against conflicts caused by the role expectations of a younger general population.[159] Further, there is evidence that older persons in an age-concentrated environment hold more liberal or permissive attitudes toward the behavior of their age-peers that do those of comparable status residing in their hometowns in age-integrated communities.[160]

Thus, there is a very strong case to be made that age-homogeneous environments designed exclusively for retirees (or those of retirement age) meet the needs of their residents very well. In addition, both the number of older persons in the population at large and the number attracted to age-homogeneous communities is very substantial and growing rapidly. According to 1977 data there were almost forty-four million people in the United States aged fifty-five or older, a full twenty percent of the population.[161] In addition, age-homogeneous communities, not only in the "sun belt" but in the metropolitan northeast, are virtually exploding with newcomers.[162] Thus, there is substantial evidence that age-homogeneous communities serve well the needs of those presently residing there in ways that age-integrated housing cannot, and that the number of persons having such needs represent a large segment of our population. It would seem clear that governmental action directed at meeting the acknowledged needs of a large portion of the population is in furtherance of the general welfare, absent some very strong countervailing considerations.[163]

Aside from serving the social and psychological needs of those of retirement age, age-restrictive housing may serve other needs as well. Statistics show that a disproportionate number of victims of violent crime, such as assault and robbery, are older persons, and that a disproportionate share of such crimes are committed by adolescents and adults in their early

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157. *Id.* at 213. There is evidence that friendships or social contacts would not result if the replacement pool were younger in age. *Id.* at 210.

168. *See* Messer, *The Possibility of an Age-Concentrated Environment Becoming a Normative System*, 7 GERONTOLOGIST 247, 250 (1967).

159. *Id.*

160. Bultena & Wood, *supra* note 155, at 213.

161. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1978, at 29, Table 29 (99th ed. 1978).

162. *See* Doyle, *supra* note 10, at 64.

163. Whether a particular action is constitutionally permissible, however, is a different issue. While there may exist legitimate state interests that can be served by age-restrictive housing, this does not validate per se all age-restrictive actions.

twenties.[164] Decreasing the physical propinquity between the two age groups may serve to decrease the peculiar susceptibility of older citizens to violent crime, and perhaps even decrease the amount of such crime in absolute terms.[165] Thus, the age group that is least well-equipped to deal with the economic and physical consequences of violent crime may have the incidence of such crime among their age group diminished by age-homogeneous housing, thus providing an additional justification for it.

Finally, age-restrictive housing for retirees, and perhaps generally, may serve the political value of freedom of association that is surely connected with the general welfare. Constitutional validation of age-restrictive communities would neither mandate their creation nor require anyone to live within their confines. Presumably, a citizen would have the choice of living in an age-integrated or age-homogeneous environment, a choice that may not be possible unless age restrictions could be established or at least enforced by the state. If it is assumed that a significant number of people would remain in age-integrated environments, it is unlikely that the associational opportunities of other segments of the population would be seriously affected.[166]

While substantial authority exists that significant benefits may accrue as a result of age-restrictive housing for those of retirement age, there has also been commentary which asserts that these communities are detrimental both to their residents and to the community at-large. Retirement communities have been criticized for their emphasis on leisure and the lack of purpose that such an emphasis engenders. One commentator has referred to them as "nurseries of second childhood,"[167] and has criticized the fact that many people in these communities feel unconstrained by the social laws and expectations of the larger society, leading to an "impoverishment of personality."[168]

While such criticism probably represents a minority view in the literature,[169] it strikes at the heart of the legitimacy of age-restrictive housing, at least with respect to this age group, because it asserts that age-restrictiveness is not even beneficial to the group it purports to serve apart from any failure to in some way serve the larger society. While such

164. In 1976, approximately 30% of all robberies and 45.6% of all larcenies were committed by persons under 18. Persons under 18 were generally responsible for 42.8% of all serious crime. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1977, at 177, Table 294 (98th ed. 1977). Concerning the particular susceptibility of older persons to serious crime, see Gubrium, *Victimization in Old Age*, 20 CRIME AND DELINQUENCY 245 (1974).

165. Since older citizens present targets for crime who are particularly vulnerable and least likely to successfully defend themselves, there is probably some portion of the criminal population that would choose not to commit such crimes at all, or perhaps less of them, if the only readily available targets were younger people more likely to be able to successfully defend themselves and their property.

166. If younger persons believe that there are benefits to be gained from association with older persons, there will certainly be sufficient numbers desiring to live in the age-integrated society at-large to afford such opportunities. Thus, the associational opportunities of one segment of the population can be significantly enhanced without meaningful detriment to other segments.

167. D. JONAS & D. JONAS, YOUNG TILL WE DIE 155 (1973).

168. *Id.* at 154.

169. *See* Buletena & Wood, *supra* note 155, at 210.

criticism presents a serious potential problem to upholding age-restrictive housing, it must be said that this view is not accepted by much of the older population itself. In fact, it is precisely this attitude of the younger segment of the population—that they know what is best for older citizens—that infuriates many of the latter, and in part, influences their decision to live in an environment of age homogeneity. Many retirees feel that they have earned the right through many years of hard labor to spend the remaining years of their life in what other, younger members of society may view as a "purposeless" fashion.[170] They view it as outrageously presumptuous for sociologists and psychologists to tell them that this attitude is somehow improper. For them, a release from the social laws of the society at large is not personality impoverishment, but long awaited freedom. Some feel that the values of responsibility and contribution are unnecessary among a group that has already contributed and has earned the right to be free of responsibility.[171]

Age-restrictive housing for those of retirement age has, however, been criticized on grounds that admit that some benefit accrues to those permitted to live in such communities, but deny that such practices serve the general welfare. It has been asserted that widespread age-districting may result in less intergenerational contact with adverse consequences to the society. Older persons would refuse involvement with the general culture, thus depriving it of their wisdom and expertise, and young people would be denied the opportunity to prepare for their own aging by witnessing the aging process in others.[172] To the extent that the above assertions are accurate, they do indicate that the benefits of age-segregated housing may not be in the general interest, at least when it serves to segregate those persons well into the aging process from the rest of the society.

One can easily speculate, however, that neither of the above conditions would result even from substantial age-districting. First, it may logically be assumed that many who are eligible to live in age-homogeneous surroundings will not choose to do so. Thus, there will be ample opportunity for intergenerational contact as an instructional process to teach adaptation to the aging phenomenon. Also, those older citizens wishing to identify with and contribute to the culture at large would remain able to do so, while the others would probably not do so even if age-homogeneous living options were unavailable. This latter conclusion is supported by studies which indicate that mere geographical propinquity of older and younger persons is no assurance of meaningful intergenerational interaction.[173] In fact, forced intergenerational contact through a lack of legal alternatives may actually serve to create, rather than lessen,

170. *Id.* at 214.

171. *Id. See also* Messer, *supra* note 158, at 250.

172. *See* Doyle, *supra* note 10, at 82 n.75.

173. Bultena & Wood, *supra* note 155, at 210.

intergenerational hostility.[174] In a recent episode in Arizona a widow with small children who moved into a community of retirees was harrassed, received threatening letters from her neighbors, and had her home looted as a result of the presence of her children in the community.[175] It can certainly be argued that the attitude of many older persons is not one of hostility toward children per se but of having to live with them in *continuous* proximity, and that the attitude of older persons toward children might be more receptive if they could interact with children on their own terms.

Another possible criticism of age-restrictive housing is that enforced segregation of any type is harmful to a society that fundamentally values equality, at least equality of opportunity. Further, segregation becomes even more distasteful when based upon immutable physical characteristics, such as race.[176] While there may be some merit in such criticism, situations involving age-restrictive housing for retirees are clearly distinguishable from racial segregation from a social, as well as a legal,[177] perspective. First, in one sense, age is not immutable in the same way as race. One's racial or ethnic heritage is a lifelong characteristic; one's age is always changing. Most people in the United States now live past the age of fifty-five, and therefore most people will someday not be in the class of excludees, either as children, the parents of children, or as younger adults. Second, exclusion as a result of one's age certainly does not carry the social stigma that exclusion as a result of one's race has historically carried. After all, children are excluded as a result of characteristics that are presumed to be common to *all* children, as a *normal* part of the growth process, and therefore there is no inference of inferiority. Rather, there is simply a recognition that children as a class share certain *temporary* characteristics undesirable to a portion of the population. It also seems that there is little danger of the permanent psychological harm that might be suffered by children subject to racial discrimination, especially since the children subject to age discrimination may never know they have been the subjects of discrimination at all.[178] Finally, there is not the political spectre of the oppression of a minority by a majority. Retirees, despite their growing numbers, are still a substantial minority of the population. Age-segregated housing looks more like a societal recognition that a particular segment of the society has special needs that can only be met in a certain way, rather than smacking of political repression. In all these respects, age segregation in housing is sufficiently distinguishable from racial segregation to prevent

174. *Id.* at 214.

175. *Elderly in Arizona Town Fight to Keep Children Out*, N.Y. Times, Jan. 29, 1976, at 35.

176. *See* Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 291 (1978).

177. *See* text at note 65 *supra*.

178. Assuming that the age restriction excluded only children, and not young adults, and the minimum age for occupancy was set relatively low, *e.g.*, 12 years, it is readily conceivable that a child sufficiently young to be excluded will not be aware of his or her exclusion in the establishment of a family residence.

its invalidation in all cases for failure to satisfy the "general welfare" test.

A final criticism directed as age-restrictive housing raises the question whether any regulation depriving substantial segments of the population of the opportunity to locate in the particular location of their choice can serve the public welfare. A short answer to this, of course, is that such a broad assertion would serve to invalidate all zoning which prevents certain economic groups from locating in any neighborhood they please. While much "snob" zoning has been invalidated as exclusionary,[179] sufficient valid power continues to exist to prevent large economic groups from settling in the neighborhood of their choice.[180] While age-restrictiveness can reach the point at which it becomes constitutionally invalid under the balancing process outlined previously,[181] its exclusionary nature is clearly not enough, in itself, to invalidate it in all cases as inimical to the general welfare.

The above analysis is in the author's opinion sufficient to establish that age-homogeneous housing for persons of retirement age is not per se unconstitutional because it fails to serve the general welfare. *Village of Belle Terre v. Boraas*[182] provides concrete support for the proposition that a regulatory action can be designed and implemented to meet the social and psychological needs of only a portion of the population and still satisfy the general welfare standard. There is strong evidence that certain needs of a substantial part of the older segment of the population can only be met by age-homogeneous housing and that such housing can be permitted without substantial social cost to the remainder of society. Even if one accepts that there are counter-arguments to these assertions, in arguable cases a presumption of legislative validity should prevail, and the Court should accept a legislative judgment that age-restrictive housing for persons of retirement age may further the general welfare.

Obviously, most of the prior discussion deals with the validity of age-homogeneous housing for persons of retirement age. The question becomes much more difficult when other forms of age-restrictive housing are considered. For example, an attempt to exclude children from an apartment complex designed for "young singles" would be a much more doubtful proposition. The presence and extent of peculiar needs on the part of this age group that can only be met by age-restrictive housing is much less clear, and the necessity of age-restrictive action on the part of the state to meet these needs is less certain. I am not prepared to say, however, that *any* state action enforcing or establishing such restrictions would be contrary to the general welfare.[183] I do think, however, that such measures

179. *See, e.g.*, cases cited in note 6 *supra*.

180. *See* Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 190-91, 336 A.2d 713, 733 (1975).

181. *See* text accompanying notes 102-49 *supra*.

182. 416 U.S. 1 (1974).

183. Determining the relative legitimacy of social and psychological needs is obviously a very difficult proposition. If it could be shown that many "young singles" would be significantly happier in a

would be less likely to satisfy the constitutional standards than age-restrictive housing designed for retirees. Finally, I think that age-restrictive housing that seeks to exclude *older* persons (*e.g.*, fifty-five or older) would be very unlikely to be deemed to advance the general welfare. It *does* resemble the oppression of a minority by the younger majority and the characteristic of old age is immutable—no one ever gets any younger. I think such a situation is much closer to that of racial discrimination and should be held not to satisfy the general welfare standard.

It should be reiterated that while I believe in certain instances age discrimination in housing can serve the general welfare, I make no assertion that it is constitutionally valid in all cases. Rather, such measures simply could not be invalidated in *all* cases for failure to further the general welfare. Instead, the Court would accept that at least certain age-restrictive measures, for example, those involving retirees, can function to further the general welfare, thus satisfying the "threshhold test," and should then be examined under the due process balancing process outlined in the previous section of this article.[184] This section has been intended merely to demonstrate that a court should not decide in every case that age-restrictive housing cannot be of sufficient social value to satisfy the general welfare standard.

VI. CONSTITUTIONAL IMPLICATIONS OF OTHER EXCLUSIONARY DEVICES

A. *Restrictive Covenants*

Only one reported case has heretofore dealt with the permissibility of establishing age-exclusive neighborhoods through the use of mutual restrictive covenants. In *Riley v. Stoves*, the Court of Appeals of Arizona was faced with a constitutional challenge to a restrictive covenant applicable to a mobile home subdivision of thirty-nine lots. The covenant restricted occupancy of any mobile home within the subdivision to persons over twenty-one years of age,[186] and it was admitted at trial that the defendant lived on a lot within the subdivision with two children under twenty-one.[187] The defendant challenged the constitutionality of the enforcement of the covenant on equal protection grounds.

The court applied the less rigorous tier of equal protection analysis, since the plaintiff, unaccountably,[188] did not assert that the enforcement of the covenant would infringe upon a fundamental right. The court found

child-free environment, distinguishing them from those of retirement age might be a very difficult proposition.

184. *See* text accompanying notes 102-49 *supra*.

185. 22 Ariz. App. 223, 526 P.2d 747 (1974).

186. *Id.* at 225, 526 P. 2d 747 (1974).

187. *Id.*

188. It has been recognized that it is virtually impossible to invalidate legislation under the rational basis tier of equal protection analysis. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting).

little to distinguish the case from *Belle Terre*, stating that "it simply involves a prohibition of certain combinations of persons living on a lot in one portion of the subdivision."[189] The court determined that the restrictions were reasonably necessary to fulfill the legitimate need of older buyers to be free from the noise and distractions caused by children, and concluded that they did not violate the equal protection clause.

It should be apparent from the plaintiff's claims and the court's discussion that the case was decided before *Moore*.[190] The court did, however, mention two factors that distinguish it from *Moore* and would suggest that the covenants would be enforced under the substantive due process analysis discussed above.[191] The court stated that "there was no testimony as to any shortage of housing in the area or any desperate need for housing which would accommodate families with children,"[192] distinguishing it from *Molino*. The court also mentioned that the restriction only applied to a small portion of a subdivision,[193] which presumably was itself only a small portion of the area subject to the zoning authority. Both of these factors are important in determining the degree of infringement upon the rights of the excludees and the suitability of the means to accomplish the legitimate end of providing housing for that portion of the population seeking to be free from the distractions of children.

In the background of this case, however, lurks a potentially more far-reaching issue than whether the restrictive covenant in this case would satisfy the requirements of due process. The court in *Riley* simply assumed the presence of state action in the court enforcement of the covenant, relying upon *Shelley v. Kraemer*.[194] *Shelley* was the United States Supreme Court case in which it was held that the enforcement by a state court of a racially restrictive covenant, pursuant to the state's common law policy of enforcing such agreements, constituted state action for purposes of the fourteenth amendment.[195] The theoretical foundation of *Shelley*, which could serve to distinguish it from the vast array of situations in which states are called upon to give legal sanction and enforcement to relationships established by private action,[196] was not clearly articulated in that case. Subsequent attempts to formulate a limiting rationale,[197] while more or

189. 22 Ariz. App. at 229, 526 P.2d at 753.

190. Otherwise, it would be truly inconceivable why no claim to violation of fundamental rights was made. Also, the language of the court cited in the text accompanying note 189 *supra* would probably not have been present after *Moore*.

191. *See* text accompanying notes 102-49 *supra*.

192. 22 Ariz. App. 228, 526 P.2d at 752.

193. *Id.*

194. 334 U.S. 1 (1948).

195. The Civil Rights Cases, 109 U.S. 3 (1883), firmly established the proposition that the fourteenth amendment applies only to "state action" and not to private conduct.

196. *See* Evans v. Abney, 396 U.S. 435 (1970).

197. *See, e.g.*, Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959);

less successful in a rhetorical sense and not inconsistent with the holding of the case, have never been expressly adopted by the Court to limit *Shelley*.

Perhaps the most obvious distinguishing factor between *Shelley* and *Riley* is that *Shelley* involved a *racially* restrictive covenant while *Riley* involved an age-restrictive convenant. At first glance, while such a distinction may be critical for purposes of determing the existence of a substantive violation of the fourteenth amendment, it would seem irrelevant to a determination of the presence or absence of state action. It has been argued elsewhere, however, that this distinction is determinative for the latter purpose as well,[198] and the evolution of state action doctrine generally lends substantial support, if not doctrinal satisfaction, to this proposition.

Since *Shelley*, and particularly after the case of *Reitman v. Mulkey*,[199] the courts have been confronted with cases in which the state has been called upon to enforce private actions taken pursuant to facially neutral state statutes or common law policies which, if such actions were directly undertaken by the state, would be clearly unconstitutional. Because of the potential that *Shelley* and *Reitman* present for overruling the state action requirement of the *Civil Rights Cases*,[200] many courts have expressly viewed cases involving racial discrimination as requiring a quantitatively and qualitatively different involvement of the state than cases concerning other constitutional prohibitions before the requisite state action will be found.

The Second Circuit courts, in a multitude of cases,[201] have stated that a "double standard" of state action exists that is solely dependent upon whether the alleged unconstitutional action involves racial discrimination. Generally, the courts have merely stated this policy with no explanation, while in other cases, including the case that seems to be the genesis of the doctrine,[202] they have only briefly, and never in a fully satisfactory manner,[203] articulated the basis for the distinction. Courts have relied upon the fact that the fourteenth amendment was originally directed at racial discrimination,[204] that state power has been used more often to

Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959). *See also* Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 137, 141 (1976).

198. *See* Doyle, *supra* note 10, at 100, 104.

199. 387 U.S. 369 (1967).

200. 109 U.S. 3 (1883).

201. *See, e.g.*, Jackson v. Statler Foundation, 496 F.2d 623, 628-29 (2d Cir. 1974); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Lefcourt v. Legal Aid Soc'y, 445 F.2d 1150 (2d Cir. 1971); United States v. Wiseman, 445 F.2d 792 (2d Cir. 1971); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Girard v. 94th Street & Fifth Avenue Corp., 396 F. Supp. 450 (S.D.N.Y. 1975); Barrett v. United Hospital, 376 F. Supp. 791 (S.D.N.Y. 1974).

202. Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).

203. *See, e.g.*, the circular language in Jackson v. Statler Foundation, 496 F.2d 623, 629 (2d Cir. 1974).

204. *See* Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927, 931 (1st Cir. 1974); Edwards v. Habib, 397 F.2d 687, 693 (D.C. Cir. 1968).

foster racial discrimination than to deny other constitutional rights,[205] and that state inaction in the past has often been found to constitute affirmative encouragement of racial discrimination.[206] To conclude, however, from these premises that there should be a difference in the requisite level of state action to invoke fourteenth amendment protection seems to present a non sequiter. While the substantive protection accorded by various constitutional provisions may change depending upon the history of the provision, and courts may be more wary in the fact-finding process in racial cases since the state has more often sought to use its power to deny racial equality than to deny other rights, there is no logical or historical reason that, once the facts are ascertained, the state may involve itself more in denying, for example, free speech rights than in racial discrimination. For constitutional purposes, whether the state has a justification for acting is an entirely different and severable question from whether it has acted at all. While the *nature* of state action may differ depending upon the right being denied, and thus be a legitimate basis for distinction,[207] if the state is involved in the same way and to the same degree in a non-racial case as in a racial case, there seems to be no justification for saying that the state is "acting" in one case and not "acting" in the other. Again, however, the right at issue may be determinative of whether the action of the state, assuming it is present, is constitutionally justified.

Despite the lack of satisfactory explanation, numerous other federal courts have indicated that they view such a double standard as appropriate. The First,[208] Fifth,[209] Ninth,[210] and District of Columbia[211] Circuits, and the district courts in North Carolina,[212] Nebraska,[213] and California[214] have all expressly acknowledged the state action dichotomy. Therefore, there would be substantial precedent upon which to argue that the presence of racial discrimination in *Shelley v. Kraemer* is sufficient to distinguish it from a situation involving age-restrictive covenants, even though all other relevant factors remain the same.[215]

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205. *See* Lavoie v. Bigwood, 457 F.2d 7, 11 n.9 (1st Cir. 1972).

206. *See* Lefcourt v. Legal Aid Soc'y, 445 F.2d 1150, 1155 n.6 (2d Cir. 1971).

207. *See* Commonwealth v. Brown, 270 F. Supp. 782, 789 (E.D. Pa. 1967).

208. Lavoie v. Bigwood, 457 F.2d 7, 11 n.9 (1st Cir. 1972).

209. James v. Pinnix, 495 F.2d 206, 208 (5th Cir. 1974).

210. Adams v. Southern Calif. First Nat'l Bank, 492 F.2d 324, 333 nn.23 & 24 (9th Cir. 1973).

211. Edwards v. Habib, 397 F.2d 687, 693 (D.C. Cir. 1968).

212. Arrington v. Taylor, 380 F. Supp. 1348, 1359 (N.D.N.C. 1974).

213. Pease v. Havelock Nat'l Bank, 351 F. Supp. 118, 121 (D. Neb. 1972).

214. Oller v. Bank of Am., 342 F. Supp. 21 (N.D. Cal. 1972). Some states have also recognized the distinction; *see, e.g.*, Lockwood v. Killian, 172 Conn. 496, 375 A.2d 998 (1977).

215. It may also be that the specific situation before the court may differ from *Shelley* in another way. In *Shelley*, the result of the enforcement of the covenant would have been to force an unwilling party to discriminate. If a suit is brought against a violator in a situation not involving sale or rental to a third party, *e.g.*, where a couple who is subject to the covenant acquires a child, this unwilling discrimination would not be the case. In the view of some, this may be important in determining the presence of state action. *See* Bell v. Maryland, 378 U.S. 226, 331 (1964) (Black, J., dissenting); Pollak, *supra* note 197, at 13.

It would be a mistake, however, to place too much reliance on this distinction. First, the difficulty that the courts have had in articulating the basis for the "double standard" would be exaggerated in a case where the facts were otherwise very similar to *Shelley*,[216] and courts may be reluctant to decide the case upon grounds that have little theoretical foundation. Second, *Shelley* has been relied on by lower federal courts to support a finding of state action when neither race nor restrictive covenants were involved.[217]

In addition, direct support for the application of *Shelley* outside the racial context can be found in at least one United States Supreme Court case, even though reliance upon *Shelley* was apparently not necessary to a finding of state action. In *Railway Employes' Department v. Hanson*[218] the Court was faced with the constitutionality of a union shop agreement executed between a railway union and the Union Pacific Railway. Union shop agreements were specifically authorized (but not required) by the Railway Labor Act, but were contrary to a provision in the Nebraska Constitution prohibiting such agreements. The plaintiff, a Nebraska resident and an employee of Union Pacific, asserted that the union shop agreement violated the first amendment guarantee of religious freedom, since it required the workers to be available for Sunday work. The defendant union responded that the agreement that required the Sunday work was a contract between private parties and involved no action of the state infringing upon first amendment liberties.

The Court found the presence of state action, despite the fact that the federal statute was permissive, that is, it did not *require* union shop agreements. The Court stated that the federal statute was "the source of power and authority by which any private rights are lost or sacrificed."[219] In a footnote to this quoted phrase, the Court further stated, citing *Shelley v. Kraemer* and *Barrows v. Jackson*, that "once courts enforce the agreement the sanction of government is, of course, put behind them."[220] Thus, the Court seemed to indicate that the mere enforcement of union shop agreements by courts constituted state action for purposes of the first amendment, apart from the "authorizing" power of the federal statute.[221]

Lower federal courts have directly held *Shelley* to be applicable in non-racial contexts. In *Ciba-Geigy Corp. v. Local No. 2548, United*

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216. *See generally* Wechsler, *supra* note 197.

217. *See* text accompanying notes 222-25 *infra*.

218. 351 U.S. 225 (1956).

219. 351 U.S. at 232.

220. *Id.* n.4.

221. Since the presence of the federal statute alone was sufficient under the Court's analysis for a finding of state action, the footnote would seem superfluous if the Court meant to limit the application of *Shelley* to instances where state action is supported by some independent ground. On the other hand, if the Court meant to analogize the federal statute in *Hanson* with the common law policy in *Shelley*, the extension of *Shelley* outside the racial arena becomes even more apparent.

Textile Workers,[222] the court applied the reasoning of *Shelley* to the question whether an employer could penalize employees who refused to work on Sunday for religious reasons, when the union contract permitted assignment of employees to Sunday work. In finding the requisite state action for application of the first amendment, the court stated:

> Second, and more importantly, I find the requisite government action furnished by this Court's action [in enforcing the agreement], under the reasoning of *Shelley v. Kraemer* . . . . In *Shelley*, the Supreme Court held that a private agreement which would be unconstitutional if entered into by the state was valid, so long as its terms were voluntarily adhered to by the private parties. The Court concluded, however, that any attempt to seek judicial enforcement of the agreement would sufficiently involve the state . . . so as to preclude enforcement. Both the Supreme Court and the First Circuit have acknowledged the applicability of *Shelley* to the enforcement of a collective bargaining agreement.[223]

Similarly, the court in *Linscott v. Millers Falls Co.*,[224] the First Circuit case relied on in *Ciba-Geigy*, found *Shelley* to be applicable to a collective bargaining contract.[225]

Despite these cases, *Shelley* has seldom been extended beyond the racial arena, and courts have expressly warned of the dangers of relying upon the reasoning of the case to support its application in other areas.[226] In addition, *Hanson* relied upon the presence of a federal statute, which served to invalidate state law, for its finding of state action, as well as the reasoning of *Shelley*, and may not have found *Shelley* applicable absent the neutralization of state law by the federal statute.[227] Also, the only cases outside the racial context in which direct reliance is placed upon *Shelley* are in the labor relations field, and the Court, cognizant of the dangers of over-extension, may seek to limit its application to the two well-defined areas of racial discrimination and labor relations.[228]

Nevertheless, the application of *Shelley* to an age-restrictive covenant is a substantial possibility. No rationale that has been relied on by the courts to limit *Shelley* is likely to be applicable, except the racial distinction.[229] If faced with compelling factual similarities to *Shelley*,

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222. 391 F. Supp. 287 (D.R.I. 1975).

223. *Id.* at 298 (citation omitted).

224. 440 F.2d 14 (1st Cir. 1971).

225. The court in *Linscott* clearly viewed the *Hanson* case as an extension of the *Shelley* case. In extending *Hanson* to apply to the Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (codified at 29 U.S.C. §§ 141-87 (1976)), the court answered a contention that court action against the collective bargaining agreement had to wait an enforcement action, by stating that *Hanson* had already "bridged the gap" between *Shelley* and the situation before the court, and therefore an enforcement action was not necessary before state action would be present.

226. *See, e.g.*, Fallis v. Dunbar, 386 F. Supp. 1117, 1120-21 (N.D. Ohio 1974).

227. *But see* Linscott v. Millers Falls Co., 440 F.2d 14 (1st Cir. 1971).

228. This may be especially true since few substantive violations have been found in the labor relations area. *See, e.g.*, Railway Employes' Dept. v. Hanson, 351 U.S. 225 (1956).

229. *But see* note 215 *supra*.

except for the racial aspect, and the inability to construct a reasoned basis for multivaried levels of "state action," I think the Court would determine *Shelley* to be applicable.[230]

While case authority involving age-restrictive covenants is limited to *Riley*, it is safe to say that additional cases can be expected. The continued development of age-restrictive living environments utilizing individually-owned units, and the likelihood that restrictive covenants involve only

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230. The Court has articulated at least two, and perhaps three, other bases for finding state action in "non-obvious" cases. I shall call these three theories the "state function" theory, the "state contacts" theory, and the "state authorization/encouragement" theory. The state function theory proceeds from the case of Marsh v. Alabama, 326 U.S. 501 (1946). The basis of this theory is discussed in the text accompanying notes 249-53 *infra*. The genesis of the state contacts theory is Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), a case in which a restaurant's refusal to serve Black patrons was found to be state action. The restaurant was the lessee of the Parking Authority, which was clearly a state agency. The crux of the decision seems to be that the relationship was a close and continuous one, and was to the mutual advantage of each. The Court has described the relationship present in the case as "symbiotic". *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972). The "state authorization/encouragement" theory has as its basis the *Hanson* case and the case of Reitman v. Mulkey, 387 U.S. 369 (1967). *Hanson* is discussed in the text accompanying notes 218-21 *supra*.

Two of these are fully discussed in relation to cases involving age-restrictive covenants in another article. *See* Doyle, *supra* note 10, at 101-05. While I do not concur entirely with Professor Doyle's reasoning in the cited article, I do believe that her conclusions with respect to the non-applicability of the other two theories are correct. My disagreement with her lies in the fact that I do not view the case of Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1975), as constituting as severe a restriction on *Burton* as Professor Doyle apparently believes. As she notes, the Court in *Burton* emphasized the mutually beneficial, *i.e.*, "symbiotic" nature of the relationship and this facet of *Burton* has been stressed in later cases. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972); and Jackson v. Metropolitan Edison Co., 419 U.S. at 357-58. If a symbiotic relationship was present in *Jackson*, it was clearly a symbiosis of a different sort. The heavy regulation by the state in that case was not the result of a choice by the electric company, but was imposed by the state. Much of it, I am sure, was not desired by the company, and did not operate to its benefit. It is certainly arguable that the Court is more likely to impute state action to private parties where the relationship with the state is initiated by the private party and operates to its benefit. In addition, it is very unlikely that the state benefitted from the unconstitutional practice itself in *Jackson*, as may have been the case in *Burton* if the exclusionary policy had the effect of increasing white patronage, thereby permitting a higher rent.

Despite these very minor disagreements, I agree with Professor Doyle's conclusion that no "symbiotic" relationship would be likely to exist in the case of age-exclusive restrictive covenants.

Finally, I do not believe that a fourth theory based upon the case of Reitman v. Mulkey, 387 U.S. 369 (1967), is applicable to age-restrictive covenants. *Reitman* is the case in which the Court determined that an amendment to the California Constitution prohibiting the state from denying, limiting, or abridging "the right of any person . . . to decline to sell, lease or rent . . . to such person or persons as he, in his absolute discretion, chooses," violated the fourteenth amendment. 387 U.S. at 371. The Court found that the amendment constituted state "authorization" and "encouragement" of racial discrimination, especially since it had the effect of repealing recently enacted state civil rights statutes.

In enforcing private age-restrictive covenants, however, the state neither seeks to "authorize" or "encourage" private discriminations. Assuming that the basis for enforcing such a covenant is a state policy to enforce all restrictive covenants meeting the age-neutral requirements of state property law, *Shelley* would seem to be much closer to the mark. If *Shelley* were held not to be applicable, it is hard to see how *Reitman* would be held to apply.

It is interesting to note that while the mere enforcement of age-restrictive covenants pursuant to a common law policy would present a case similar to *Shelley*, Arizona has gone further in its protection of age-restrictive covenants. An amendment to a statute which makes it illegal to refuse to rent to a family because of the presence of children, modifies this prohibition in two significant ways. First, it makes it illegal for a person to rent or lease his property to persons with children living with them if the result would be the violation of a valid restrictive covenant against the sale of such property to persons with children living with them. ARIZ. REV. STAT. § 33-1317(B) (Supp. 1977-78). Second, it forbids the rental or lease of property to persons having children when the property lies within a subdivision designed, advertised, and used as an exclusive adult subdivision. *Id.* Initial violation is made punishable by fine and imprisonment. There seems little doubt that a prosecution brought under this statute would be state action. The state is not merely enforcing a private agreement as in *Shelley*, but

private action, will result in continued use of those covenants as an age-restrictive device. Litigation which results will again present the courts with the intractable and as yet unresolved issue of defining the limits of the *Shelley* doctrine.

B. *Condominium Rules*

Two recent cases, *Franklin v. White Egret Condominium, Inc.*[231] and *Ritchey v. Villa Neuva Condominium Association*,[232] illustrate another context in which attempts have been made to restrict occupancy to adults. In *Franklin*, the challenged mechanism was an article in the Declaration of Condominium barring occupancy by children below the age of 12,[233] and in *Ritchey* it was a rule of the condominium association prohibiting residence by children under 18.[234]

Only in *Franklin* were constitutional objection to the restrictions made and considered, and the court upheld those objections in a brief conclusory paragraph. The court merely stated that the case dealt with "a number of rights which the Supreme Court of the United States has labeled 'fundamental': the right to marry . . . and the right to procreate . . . and the right to marital privacy. . . . This restriction is an unconstitutional violation of this defendant's rights to marry and procreate."[235] The court did not discuss why it felt that such a restriction violated the defendant's rights to marry and procreate, nor did it discuss the potential issue of state action.[236]

While the court in *Ritchey* did not consider whether the age restrictions relating to occupancy were constitutional, it did consider whether they were "reasonable."[237] Relying in part on *Riley v. Stoves*,[238] where constitutional objections were considered, the court concluded that the restrictions were indeed reasonable. It viewed the age restriction as a legitimate means to meet the needs of adults whose lives would presumably be disrupted by the presence of small children.[239]

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making punishable, as an offense against the state, action which violates a particular type of private agreement. Thus, the violator contends not only with the power conferred by the confluence of the private agreement and a neutral state policy of enforcing private agreements in general, but with the police power of the state invoked specifically to enforce a particular type of private agreement. *See also* Note, *Neither Seen Nor Heard: Keeping Children Out of Arizona's Adult Communities Under Arizona Revised Statutes Section 33-1317(B)*, 1975 ARIZ. ST. L.J. 813, 820-21.

231. 358 So. 2d 1084 (Fla. App. 1977).

232. 81 Cal. App. 3d 688, 146 Cal. Rptr. 695 (1978).

233. 358 So. 2d at 1087-88.

234. 81 Cal. App. 3d at 691, 146 Cal. Rptr. at 697.

235. 358 So. 2d at 1088.

236. *See* text accompanying notes 240-56 *infra*.

237. The issue of the "reasonableness" of the age restrictions was discussed in the context of CAL. CIV. CODE § 1355 (West. Supp. 1979) which makes "reasonable" restrictions established by the owner of a condominium project, and amendments thereto established by a majority of the owners of individual units, enforceable as equitable servitudes. 81 Cal. App. 3d at 696, 146 Cal. Rptr. at 699 n.7.

238. 22 Ariz. App. 223, 526 P.2d 747 (1974). *See* text accompanying notes 185-98 *supra*.

239. 81 Cal. Appl 3d at 695, 146 Cal. Rptr. at 699.

Underlying *Franklin* and *Ritchey* for purposes of the constitutional analysis is again the problem of state action. Of course, it would be possible to rely upon *Shelley* to find state action, and the arguments would be similar to those previously discussed.[240] In addition, however, it may be possible to rely upon the "state contacts," "state function," and "state authorization" theories[241] to a greater degree than in the case of restrictive covenants because of the peculiar nature of condominium ownership.

Condominium ownership is largely a creature of statute and would not exist, at least in its present form,[242] without the comprehensive legislative enactments that govern in detail the nature of the estate and the relationship of the unit owners.[243] Thus, the "contacts" with the state are much more comprehensive and detailed than in a typical situation involving restrictive covenants. In addition, the state statutes generally contain provisions authorizing governance of the condominium by rules established by the condominium association.[244] Consequently, it can be argued that the "authorization" for a rule that discriminates against families with children is expressly embodied in the statute. As in *Hanson*, the state statute is the "source of the power and authority by which any private rights are lost or sacrificed."[245] To be sure, *Hanson* considered a situation in which a federal statute overrode a contrary state law, while the present case concerns the authorization of a particular relationship that was simply not present at common law. Also, the federal statute in *Hanson* authorized the particular act that was alleged to be constitutionally defective (the existence of a union shop), while the present case deals with only a general rulemaking capacity.

While there is some force to these arguments distinguishing *Hanson*, their impact is lessened somewhat by *Reitman*, at least with respect to the latter objection. Although *Reitman* was a case in which particular civil rights statutes guaranteeing freedom from discrimination were overturned, unlike *Hanson* there was no direct state-federal conflict. Also, the state constitutional amendment at issue in *Reitman* did not specifically permit racial discrimination, but merely prohibited the state from

240. *See* text accompanying notes 194-230 *supra*. Application of *Shelley* to condominium restrictions is at once more and less compelling than in a restrictive covenant case. Since the factual similarities to *Shelley* are not as great, a court is not presented with the difficulty of explaining a different result when the sole distinguishing factor is the presence of racial discrimination in one case and not in the other. *See* text accompanying note 216 *supra*. On the other hand, such restrictions are often made enforceable pursuant to direct and explicit legislative authorization. *See* note 237 *supra* and text accompanying notes 245, 246 *infra*.

241. *See* note 230 *supra*.

242. *See* J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 247-48, 250 (2d ed. 1975).

243. *See, e.g.*, CAL. CIV. CODE §§ 1350-60 (West Supp. 1979).

244. *See, e.g.*, CAL. CIV. CODE § 1355 (West. Supp. 1979).

245. 351 U.S. at 232. *See* CAL. CIV. CODE § 1355 (West Supp. 1979) making reasonable restrictions established by majority vote of the owners of units in a condominium project enforceable as equitable servitudes. It is doubtful that such restrictions would have been enforceable as such at common law, especially since an owner who purchased before a restriction was passed could hardly have notice of the restriction. *See* Tulk v. Moxhay, 41 Eng. Rep. 1143 (1848); CRIBBET, *supra* note 242, at 256.

interfering with the right of a person to discriminate for any reason in the sale or rental of housing.[246] While I believe neither *Hanson* nor *Reitman* to be controlling in cases involving condominiums, an argument based upon these cases is far from superfluous.

At the same time it should be kept in mind that the acceptance of these arguments would be, to a large extent, the exaltation of form over substance, and would be a substantial extension of prior authority in an area marked by recent judicial conservatism.[247] Condominium associations serve in large part as functional equivalents of homeowners associations and other organizations formed in conjunction with cooperative ownership, but are not governed in detail by state enabling legislation. It seems very unlikely, however, that a court would view the activities of such organizations as "state action."[248] Yet to subject condominium associations, but not their functional analogs, to fourteenth ammendment scrutiny would seem a distinction without a difference. Thus, a court may be reluctant to apply the state contacts theory to age discrimination by condominium associations. It should also be remembered, however, that "state action" questions do not lend themselves to principled distinctions. Because there are quantitative, as well as qualitative, aspects to the problem, the line between state and private action must to some extent be arbitrary.

Finally, there exists an argument based upon the "state function" case of *Marsh v. Alabama*.[249] In *Marsh* the Court held that the proprietor of a "company town" was subject to the constraints of the first and fourteenth amendments, since the proprietor had assumed the functions normally undertaken by local government. After an initial willingness to expand the *Marsh* rationale,[250] the Court has recently restricted its scope.[251] This unwillingness to extend *Marsh*, however, has occurred almost exclusively in the context of first amendment claims involving suburban shopping centers that arguably had assumed the public function of the center-city business district where the thoroughfares were public. In contrast, many condominiums have undertaken duties which are closer to those undertaken by the "company town" in the *Marsh* case. Functions such as recreational facilities, garbage collection, street and sidewalk maintenance, and other functions are typically assumed by the condominium association.[252] Further, as suggested by Professor Doyle,[253] the

246. *See* note 230 *supra*.

247. *See e.g.*, Hudgens v. NLRB, 424 U.S. 507 (1976).

248. *Cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (where racial discrimination by a private club was held not to constitute state action despite presence of state regulation as a result of a state liquor license held by the club).

249. 326 U.S. 501 (1946).

250. Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

251. Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

252. *See* FERRER & STECHER, 1 LAW OF CONDOMINIUM 508 (1967).

253. Doyle, *supra* note 10, at 103.

254. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

larger the area encompassed by the condominium, the more the scheme of land use restrictions takes on the character of zoning legislation. An absence of governmental land use controls as a result of widespread private restrictions would make such an argument even stronger.

Of course, the particular facts of the case, that is, the functions actually assumed by the condominium association, would be important to any assertion of state action based upon *Marsh*. While it is not at all apparent that such an argument would inevitably fail, the present Court has not indicated any proclivity to extend *Marsh*.

Finally, even though a finding of state action is not dictated by any of the theories or the cases upon which they are based, "to fashion and apply a precise formula for recognition of state responsibility" has been acknowledged by the Court to be "an impossible task."[254] Thus, the *cumulative effect* of the state involvement in the condominium situation may be sufficient to constitute state action. While race is not involved, as in the *Shelley* case, a system of comprehensive state regulation is present that did not exist in *Shelley*.[255] The impact of the state involvement, while not sufficient under any single theory of state action, may have a sufficient cumulative effect to satisfy the constitutional standard.[256]

The scant and divided nature of the case authority provides no basis for predicting the outcome of future cases involving condominium rules. While the applicability of *Shelley* to such cases is less likely than in cases involving restrictive covenants, the force of other state action arguments is greater. Overall, however, because of the difficulty of distinguishing *Shelley* in a principled manner in the restrictive covenant cases, there is probably less likelihood that the requisite state action will be found.

C. *Rental Housing*

It is perhaps surprising that the situation presently causing the most widespread difficulty for excludees—rental housing—has produced the smallest volume of litigation raising constitutional issues of age-restrictive practices. I have found only one appellate case in which constitutional objections to an eviction or refusal to rent on age-restrictive grounds were raised,[257] and they were disposed of by the court without discussion. While generally the area of rental housing has seen the most legislative activity,[258] most states still have no laws prohibiting age-restrictive renting.[259] It is

255. Although the relationship is not a "symbiotic" one as in *Burton*, activities which are usually the function of the state may be present, unlike *Burton*.

256. *See* Rackin v. University of Pa., 386 F. Supp. 992 (E.D. Pa. 1974).

257. Flowers v. John Burnham & Co., 21 Cal. App. 3d 700, 98 Cal. Rptr. 644 (1971).

258. *See* text accompanying note 17 *supra*.

259. The recent case of Marina Point Ltd. v. Wolfson, 47 U.S.L.W. 2437 (Cal. Super. App. Div. 1978) concerned the application of the Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West Supp. 1979), to an instance of a refusal by an owner to rent to a family because there were children in the household. The Act does not, on its face, include children within the classes expressly protected against discrimination (only "discrimination on the basis of sex, race, color, religion, ancestry or national

likely that one of the reasons constitutional theories have been so infrequently raised in this context is that a successful theory of state action seems difficult to construct.

The problem of age-restrictive renting probably occurs in one of three ways: an initial refusal by the landlord to rent to families with children, a refusal to renew a lease at the end of its term because of the presence of children, and a covenant in the lease permitting the landlord to terminate the lease if children later occupy the premises. In none of these contexts does the prospect of a court finding state action appear high, although there are a few cases that indicate that such a search is not a hopeless endeavor, especially where the machinery of state government would be necessary to accomplish the discriminatory purpose, for example, to evict a tenant for breach of a covenant prohibiting children.

The first possibility, an initial refusal to rent, seems least vulnerable to constitutional challenge. In fact, this seems to be a paradigm of the "private discrimination" that the *Civil Rights Cases* and *Shelley* held the Constitution not to reach. The state is not enforcing, authorizing, or encouraging the discrimination complained of; the landlord is merely choosing to whom he or she desires to rent. While such private conduct may be in violation of a state or federal statute,[260] especially if the discrimination is racial in nature,[261] a constitutional challenge to a mere refusal to rent because of private discriminatory motives has never been upheld.

If the landlord attempts to enforce an age-restrictive policy by refusing to renew the leases of those who are found to have children occupying the premises, perhaps a slim basis for finding state action exists. In a small number of cases, courts have indicated that if state processes for unlawful detainer are employed to evict a tenant after the term of the lease has expired, there exists state action and the eviction procedures cannot be used to further a discriminatory purpose. Such cases are few—one concerns race,[262] and none deal with age discrimination. Constitutional challenges to eviction based upon exercise of first amendment rights, however, have been upheld[263] and, as previously mentioned, courts have indicated that the scope of private action may be greater when first

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origin" is specifically precluded). Relying upon prior cases, however, the court interpreted the statute to prohibit any "arbitrary" discrimination. *See In re* Cox, 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970).

In determining that the lower court had not found facts necessary to uphold a landlord's exclusionary policy, the court stated that the proper test under the statute was a balancing test that takes into account the housing needs of both families with children and persons desiring to avoid children. While the basis of the decision was entirely statutory, this author obviously thinks a similar approach appropriate for the resolution of constitutional issues.

260. *See, e.g.*, Marina Point Ltd. v. Wolfson, 47 U.S.L.W. 2437 (Cal. Super. App. Div. 1978).

261. *See* note 2 *supra*.

262. Abstract Inv. Co. v. Hutchinson, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962).

263. Hosey v. Club Van Cortlandt, 299 F. Supp. 501 (S.D.N.Y. 1969); *Cf.* Newby v. Alto Rivera Apts., 60 Cal. App. 3d 288, 131 Cal. Rptr. 547 (1976) (dicta).

amendment, rather than fourteenth amendment, rights are involved.[264] Also, since the eviction of a tenant already present would be more disruptive than the mere refusal to rent, a court may be more likely to find state action present.[265]

The weight of authority, however, is against the application of *Shelley* to this situation.[266] The cases generally indicate that there must be more state involvement than the use of neutral eviction procedures to effect the discriminatory action,[267] and emphasize the potential open-endedness of the *Shelley* doctrine if applied to such cases.[268] The trend, if indeed a trend can be discerned from the small number of cases, indicates that state action is unlikely to be found.

Perhaps the most likely situation in which state action would be found is that in which the age-restrictive provision consists of a leasehold covenant agreed to by the tenant, which if broken gives the landlord the option to terminate the lease. Such a situation would more closely parallel the facts of *Shelley* and would require the court to take cognizance of the age of the occupant and the discriminatory purpose of the covenant before enforcing it, a factor that a number of courts have felt was very important in determining the boundaries of the *Shelley* doctrine.[269] In addition, the enforcement of the covenant would cause the *premature* termination of a leasehold, not merely the refusal to renew an already expired lease. Thus, the court would be assisting the landlord in exercising a right to evict that would not otherwise be present absent the discriminatory clause. The differences, however, between a refusal to renew and a premature termination are not compelling and a court would probably be unlikely to treat them differently.

Neither *Shelley* nor the other Supreme Court state action cases have been used to invalidate such a covenant, although no case on point has been found. A court may also be less likely to invalidate a nonracial covenant than a racial one, thus bringing into play the "double standard" of state action.[270] In addition, enforcement of such a covenant does not force an unwilling party to discriminate, as some have argued to be the basis of *Shelley*.[271] Further, it is difficult to argue, at least with respect to a

264. Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Edwards v. Habib, 397 F.2d 687, 693 (D.C. Cir. 1968).

265. *Cf.* Hosey v. Club Van Cortlandt, 299 F. Supp. at 506 (defining state action as essentially a policy decision rather than a strictly legal determination).

266. Weigand v. Afton View Apts., 473 F.2d 545 (8th Cir. 1973); Aluli v. Trusdell, 54 Haw. 417, 508 P.2d 1217 (1973); Mullarkey v. Borglum, 323 F. Supp. 1218 (S.D.N.Y. 1970).

267. *See* Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973); Lavoie v. Bigwood, 457 F.2d 7 (1st Cir. 1972).

268. Aluli v. Trusdell, 54 Haw. at 422, 508 P.2d at 1221. *But see* Hosey v. Club Van Cortlandt, 299 F. Supp. at 506 n.24 (S.D.N.Y. 1969).

269. *See, e.g.*, Lavoie v. Bigwood, 457 F.2d at 11; Fallis v. Dunbar, 386 F. Supp. 1117, 1120 (N.D. Ohio 1974). *See also* Griffin v. Maryland, 378 U.S. 130 (1964).

270. *See* text accompanying notes 201-16 *supra*.

271. *See* Parks v. Mr. Ford, 68 F.R.D. 305, 313 (E.D. Pa. 1975); Adams v. Southern Calif. Nat'l Bank, 492 F.2d 324, 337 (9th Cir. 1973); Pollak, *supra* note 197, at 13.

landlord occupying a single building, that he is performing a public function similar to zoning, as where a large developer employs restrictive covenants to determine land use over a large area.

Finally, courts are wary of extending the state action doctrines of *Shelley*, *Burton*, *Reitman*, and *Marsh* because there is very little in the way of logical limitation. In many cases it becomes almost intuitive judgement, delicately balancing the duty of the state to be free from engaging in unwarranted discrimination with the private right to act without concern that the state's social views will be imposed upon us, at least outside of the representative process. The balance, of course, is a precarious one, especially for a nation that envisions itself a bastion of both freedom and equality. While it has been advocated that the state action concept be greatly expanded,[272] such a route is not only unnecessary, but probably dangerous. Excessive use of the coercive power of the state outside the representative process creates resentment, hostility, and a feeling of powerlessness. It leaves no room for man to engage in the "foibles and irrationalities"[273] that constitute so much of the psychological value of political freedom. Certainly the state should seek to set a moral example by disassociating itself from private discrimination. Perhaps, however, we cannot and should not ask the Constitution to do much more.

As previously mentioned, there have been virtually no appellate cases dealing with discrimination in rental housing. It might be useful, however, to briefly address the question of whether measures designed to exclude children from rental housing would be validated if it is assumed that state action were present. While much of the discussion dealing with the validity of age-restrictive zoning measures would be relevant to a determination of the validity of age restrictions in rental housing,[274] there are distinctions that may be important for purposes of constitutional analysis. First, the motivations of the discriminatory landlord may be very different from the reasons prompting an age-exclusive zoning ordinance. A landlord is likely to be motivated by a belief that renting to families with children is more likely to result in damage to the premises, or by the fear that the presence of children may increase the likelihood of accident and consequently increase the likelihood of a tort suit. While the protection of such interests arguably serves the general welfare,[275] the empirical validity of the assertions is open to doubt. In addition, unrelated discriminatory actions by individual landlords are less likely to result in benefit to those recognized by society to have legitimate needs that can only be met by age-restrictive housing. For

272. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 153 (1976). In this intriguing article, Professor Fiss suggests that any law which, in a given situation, operates to the disadvantage of certain groups is sufficient to establish the presence of state action, whether or not the legislation is facially neutral.

273. *See* Henkin, *supra* note 197, at 488; Doyle, *supra* note 10, at 1014.

274. *See* text accompanying notes 102-49 *supra*.

275. As a general matter, it is usually viewed as desirable to permit persons to take action to preserve and protect their property. Whether the state should permit it to be done in this manner is, of course, a different question.

example, a city apartment that is in no way different from other apartments, but that the landlord refuses to rent to families with children, is likely to be leased to adults who do not care one way or the other whether children are permitted in the other apartments in the building. This differs from the situation in which the housing is planned and developed to meet the needs of the class of people that society recognizes has a legitimate need to be free of children, such as a retirement community. Also, as the statistics previously recited indicate,[276] much of the discrimination in rental housing is occurring in the area where it has the greatest adverse impact on society—the large urban area where there is the greatest shortage of suitable housing for residents of the community. Finally, it may be that individual discriminatory actions on the part of landlords, excluding families with children, would not be deemed to satisfy any need that is recognized as a legitimate governmental interest and therefore not even satisfy the general welfare standard. Even if a court is willing to recognize the legitimacy of the interests served by age-restrictive renting after considering the factors just mentioned, it is likely the balancing process of the courts in a particular case will be substantially different from that employed in a case of age-restrictive zoning.

The rental context is likely to provide the most fertile ground for both future litigation and scholarly commentary.[277] For many families, especially those of child bearing age, the cost of a single-family residence, or even a condominium, has become prohibitive,[278] and this phenomenon is not likely to disappear in the near future.[279] Thus, more families that include small children are likely to turn to rental housing.

At the same time, reliance on constitutional claims seems least promising in this context. The presence of state action seems unlikely and the legitimate interests of the landlord, not present in other contexts, must be considered. There is, however, increasing evidence of a favorable legislative response at the local level to the plight of such families,[280] and perhaps the legislature is the most desirable forum for its resolution.[281]

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276. *See* text accompanying notes 11-16 *supra*.

277. *See, e.g.*, Dunaway & Blied, *Discrimination Against Children in Rental Housing: A California Perspective*, 19 SANTA CLARA LAW. 21 (1979).

278. The median sales price for a new single-family home in the second quarter of 1978 was $55,200. The average purchase price for existing homes financed through conventional first mortgage loans in 1978 was $55,100. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1978, at 800-01 (99th ed. 1978).

279. If anything, the trend is accelerating. From 1965 to 1970 the increase in the median sales price of a new single-family home increased from $20,000 to $23,400 or a modest 17%. From 1970 to 1975 the increase was from $23,400 to $39,300 or 68%. From 1975 to the second quarter of 1978 the median price jumped from $39,300 to $55,200, or an increase of 40% in just 3-1/2 years. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1978, at 800-01 (99th ed. 1978).

280. Dunaway & Blied, *supra* note 277, at 51.

281. *See* Conclusion *infra*.

VII. CONCLUSION

I have intended this paper as an examination of the constitutional aspects of age-restrictive housing. I have focused both on the substantive constitutional questions, especially on privacy and procreation rights, and on the threshold questions of state involvement. Perhaps the Constitution is not the best means of resolving the questions posed by this situation. Each side in the controversy can claim, with some justification, the infringement of legitimate interests, and the extent of relative infringement can vary greatly. Thus, a flexibility may be required that is not present in the framework of constitutional analysis, and that consequently is more amenable to legislative compromise. On the other hand, the very importance of the interests which may be involved and the potential for substantial infringement of these interests are such that we should be wary of deciding that constitutional guarantees have no relevance. It is suggested that the due process approach outlined in this paper provides the appropriate decisional context. It permits substantial deference to the legislature while providing the most flexible mode of constitutional analysis. At the same time, it serves to insure that no interests must look solely to the majoritarian process for their protection.